TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 121.

THE NORTHERN PACIFIC RAILROAD COMPANY AND THOMAS F. OAKES, HENRY C. PAYNE, AND HENRY C. ROUSE, RECEIVERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, APPELLANTS,

vs.

THE MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY AND THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED FEBRUARY 7, 1896.

(16,177.)

(16,177.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 121.

THE NORTHERN PACIFIC RAILROAD COMPANY AND THOMAS F. OAKES, HENRY C. PAYNE, AND HENRY C. ROUSE, RECEIVERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, APPELLANTS,

vs.

THE MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY AND THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 19, 1897.

a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1894.

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. Oakes, Henry C. Payne, and Henry C. Rouse, Receivers of the Northern Pacific Railroad Company, Appellants,

vs.

MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING Company and The Chicago, St. Paul, Minneapolis and Omaha Railway Company, Appellees.

No. 208.

Mr. F. M. Dudley, counsel for appellants.

Mr. S. J. Bradford, Mr. Newel H. Clapp, Mr. A. E. Macartney, counsel for Musser-Sauntry Land, Logging & Manufacturing Co., appellees.

Mr. Thomas Wilson, counsel for The Chicago, St. Paul, Minneapolis and Omaha Railway Co., appellees.

Appeal from the circuit court of the United States for the western district of Wisconsin.

Transcript of record filed October 15, 1894.
Printed record filed Nov. 24, 1894.

OLIVER T. MORTON, *Clerk.*

b In the Circuit Court of the United States for the Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Complainants and Appellants,

vs.

MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING Company and The Chicago, St. Paul, Minneapolis & Omaha Railway Company, Defendants and Appellees.

1 In the Circuit Court of the United States in and for the Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Complainants and Appellants,

vs.

MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING Company and The Chicago, St. Paul, Minneapolis & Omaha Railway Company, Defendants and Appellee-.

Transcript of Record.

Be it remembered that heretofore, to wit: on the 3rd day of May, A. D. 1893, came the above-named complainant, Northern Pacific

Railroad Company, by Fred. M. Dudley and Ross, Dwyer & Hanitch, its solicitors, and filed its bill of complaint as follows:

Bill of Complaint.

Bill of complaint. Filed May 3, 1893.

To the judges of the United States circuit court for the western district of Wisconsin:

The Northern Pacific Railroad Company, a corporation created, organized and existing under and by virtue of an act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," approved July 2, 1864, and those certain acts and joint resolutions supplementary thereto and amendatory thereof, brings this its bill, against the Musser-Sauntry Land, Logging and Manufacturing Company, a corporation created, organized and existing under and by virtue of the laws of the State of Iowa; and the Chicago, St. Paul, Minneapolis and Omaha Railway Company, a corporation created, organized and existing under and by virtue of the laws of the State of Wisconsin and a citizen of said State.

Bill of complaint. 2

And humbly complaining, your orator showeth unto this honorable court:

I. That in and by said act of Congress of the United States, approved July 2, 1864, your orator was authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be determined by your orator, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget sound, with a branch via the valley of the Columbia river, to a point at or near Portland, Oregon, leaving the main trunk line at the most suitable place not more than three hundred miles from its western terminus. And your orator was, by said act, vested with all the powers, privileges and immunities necessary to carry into effect the purposes of said act as therein set forth.

That by the third section of said act there was granted to your orator, for the purpose of aiding in the construction of said railroad and telegraph line, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as your orator might adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passed through any State, and whenever on the line thereof the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed,

and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections should have been granted, reserved, sold, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands were to be selected by your orator in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections; provided, that if said route should be found upon the line of any other railroad route, to aid in the construction of which lands had been theretofore granted by the United States, as far as the routes should be upon the same general line, the amount of land theretofore granted should be deducted from the amount granted by said act of July 2, 1864; provided further, that the railroad company receiving the previous grant of land might assign their interest to your orator, or might consolidate, confederate and associate with your orator upon the terms named in the first section of said act of July 2, 1864.

And by the fourth section of said act of July 2, 1864, it was provided that whenever your orator should have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States should appoint three commissioners to examine the same, and if it should appear to said commissioners that twenty-five consecutive miles of said railroad and telegraph line had been completed in a good, substantial and workmanlike manner, as required by said act, the commissioners should so report to the President of the United States, and patents of land, as aforesaid, should be issued to your orator, confirming to your orator the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles of said road should be constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents should be issued to your orator conveying the additional sections of land, as aforesaid, and so on as fast as every twenty-five miles of said road should be completed as aforesaid.

That by the sixth section of said act it was provided that the President of the United States should cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route should be fixed, and as fast as should be required by the construction of said railroad; and the odd-numbered sections of land thereby granted should not be liable to sale, or entry, or pre-emption before or after they were surveyed, except by your orator, as provided in said act.

II.

That your orator duly accepted the terms, conditions and impositions of said act, and signified such acceptance in writing under

Bill of complaint. 4
Filed May 3, 1893.

its corporate seal, duly executed pursuant to the direction of its board of directors first had and obtained; and thereafter, to wit: December 29th, 1864, served such acceptance on the President of the United States.

III.

And your orator further shows, that July 30, 1870, your orator fixed the general route of its said road, commencing at a point near the mouth of the Montreal river, in township 47 north, of range 1 east of the 4th principal meridian, Wisconsin, thence westerly to Puget sound; and filed plats thereof with the Secretary of the Interior. That August 13, 1870, the Secretary of the Interior transmitted said maps of general route to the Commissioner of the General Land Office, with instructions to direct the proper local land officers in Wisconsin and Minnesota, to withhold from sale, pre-emption, homestead and other disposal, the odd-numbered sections not sold, reserved, and to which prior rights had not attached, within 20 miles on each side of the route; and in like manner to direct the local officers in Washington Territory to withhold such odd-numbered sections as lie south of the town of Steilacoom. The unsurveyed as well as the surveyed lands were included in said order; and the said Commissioner was instructed to direct the local officers to give notice accordingly. And on said August 13, 1870, the said maps were duly filed in the office of the Commissioner of the General Land Office. That thereafter, to wit: September 15, 1870, the Commissioner of the General Land Office transmitted to the register and receiver of the United States district land office for the district of Bayfield, Wisconsin, the following order:

"Register and receiver, Bayfield, Wis.

"GENTLEMEN: I transmit herewith a diagram showing the designated route of the Northern Pacific railroad, under act July 2, 1864, and by direction of the Secretary of the Interior you are requested to withhold from sale or location, pre-emption or homestead entry, all the odd-numbered sections of public lands falling within the limits of 20 miles designated on this map. You will also increase to $2.50 per acre the even-numbered sections within those limits and dispose of them at that ratability under the pre-emption and homestead laws only no private entry of the same being admissible

Bill of complaint. 5
Filed May 3, '93.

until these lands have been offered at the increased price. This order will take effect from the date of its receipt by you and you are requested to acknowledge without delay the time of its receipt.

"Very respectfully,

JOS. S. WILSON,
"*Commissioner.*"

That said order and the diagram therein referred to were received at said district land office and filed therein September 27, 1870.

That the lands described in Schedules "A" and "B" hereunto annexed and hereby referred to and made a part of this bill were at all times between October, 1860, and September, 1886, situate in the said United States land district of Bayfield; and they were on and within twenty miles of said line of general route so fixed as aforesaid and were within the external limits of said withdrawal as shown on said diagram transmitted to said district land office as aforesaid.

IV.

And your orator further shows, that thereafter your orator proceeded with the work of locating and definitely fixing the line of its said railroad from a point in section 15, in township 47 north, of range 2 west of the 4th principal meridian, Wisconsin, to Puget sound. That each and every portion of the line of said road, and of the branch line of said railroad, was so definitely fixed by your orator, and plats thereof filed in the office of the Commissioner of the General Land Office, except that portion of the main line of said road, extending from Wallula, in Washington, via the valley of the Columbia, to Kalama in said Washington, prior to 188–. That said route as so definitely fixed is the most eligible railroad route as determined by said company, from said point in township 47 north of range 2 west of the fourth principal meridian, Wisconsin, thence westerly to Puget sound, north of the forty-fifth degree of latitude, and in the territory of the United States. That that portion of said line of railroad beginning at said point in township 47 north, of range 2 west of the 4th principal meridian, Wisconsin, and extending thence westerly to the said junction with the Lake Superior & Mississippi railroad, in Minnesota, where it connected with a portion of the line of your orator's said road theretofore definitely fixed, was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, July 6th, 1882. That the lands described in the said Schedules "A" and "B" hereunto annexed are on and coterminous with, and within twenty miles of, that portion of said line of definite location in the State of Wisconsin, and west of the town of Superior.

Bill of complaint. 6
Filed May 3, '93.

V.

And your orator further shows, that thereafter your orator proceeded with the construction of its said railroad and telegraph line extending on, over and along that portion of its said line of road so definitely fixed as aforesaid, extending between the junction of said line with the Lake Superior & Mississippi railroad, near Thompson, Minnesota, and a point on Bluff creek, in Superior, Wisconsin, a distance of twenty-five miles; and, having constructed that portion of its said railroad and telegraph line, so reported to the President of the United States; and thereupon the President of the United States appointed three commissioners to examine the same; and it appearing to said commissioners that that portion of said

railroad and telegraph line had been completed in a good, substa tial and workmanlike manner, as in all respects required by sai act of Congress, they so reported to the President of the Unite States, and, September 16, 1882, the President of the United Stat approved said report and ordered patents to be issued to your orat for the lands earned by the construction of that portion of sai railroad and telegraph line.

That thereafter, to wit: January 5, 1893, the acting Commissione of the General Land Office, under the direction of the Secretary the Interior, fixed the limits of the grant to your orator, coterm nous with said constructed road; and directed the register and r ceiver of the United States district land office at Bayfield, Wisconsi to withhold from sale and entry, all the odd-numbered sections o and within forty miles of said line. That the lands described i the schedules hereunto annexed are coterminous with that portio of said road so constructed, and within twenty miles thereof; an were within the limits of the withdrawal so ordered.

VI.

And your orator further shows, that thereafter the Commissione of the General Land Office, under the direction of the Secretary the Interior, ordered the register and receiver of the United State district land office at Bayfield, to withdraw from sale or entry th odd-numbered sections within forty miles of the line of the definit location of that portion of said road extending between the termi nus of said constructed road at Superior, Wisconsin, and the easter end of said line as definitely fixed.

7

VII.

Bill of complaint. Filed May 3, '93.

And your orator further shows, that there after, to wit, August 28, 1884, your orator, b a resolution duly adopted, at a meeting of it board of directors regularly held, fixed, determined and establishe the eastern terminus or point of beginning, of its line of railroad, a a point at the city of Ashland on Lake Superior, in the county o Ashland, in the State of Wisconsin, in section 27, township 48 north of range 4 west, of the fourth principal meridian. And thereafte your orator caused to be prepared a plat showing said eastern termi nus so fixed, together with so much of your orator's railroad line a was necessary to connect said terminus with the line of your orator's road theretofore definitely fixed, as aforesaid, at the nearest availa able point, to wit: in section 33, township 48 north, of range 4 west 4th principal meridian, Wisconsin, and also a portion of said line of definite location extending westwardly from said eastern termi nus fifty miles; and transmitted said plat, together with a copy o said resolution to the Secretary of the Interior. And thereafter the said Secretary, having duly approved said plat and resolution, caused the same to be filed in the office of the Commissioner of the General Land Office, November 24, 1884. And thereafter the said Commis sioner fixed the eastern terminal limit of said grant by a line ex-

tending through the said eastern terminus of said line of definite location, so fixed by your orator, and perpendicular to the general course of said road, and February 3, 1887, released all lands lying east of said terminal limit from all withdrawals for the benefit of your orator.

VIII.

And your orator further shows, that your orator proceeded with the work of constructing its said railroad and telegraph line, and has heretofore and long prior to September 29, 1890, completed, in a good, substantial and workmanlike manner, in all respects as required by said act of Congress, each and every portion of its said railroad and telegraph line extending from said eastern terminus fixed at Ashland, Wisconsin, on Lake Superior, on, over and along the line of said road as definitely fixed as shown by plats thereof filed in the office of the Commissioner of the General Land Office, to Wallula, in Washington, and from Portland, Oregon, to the waters of Puget sound; and has in a like manner, and long prior to said September 29, 1890, constructed its said branch railroad and telegraph line from Pasco junction, in Washington, to the waters of said Puget sound, on, over and along the line of said branch road as theretofore definitely fixed and shown on plats thereof, filed in the office of the Commissioner of the General Land Office. That said railroad and telegraph line so constructed, extend from said point on Lake Superior, at Ashland, in Wisconsin, westerly by the most eligible railroad route, as determined by your orator, within the territory of the United States, and north of the forty-fifth degree of latitude to Puget sound.

Bill of complaint. 8
Filed May 3, '93.

And your orator further shows, that from time to time, as sections of said railroad and telegraph line, twenty-five or more miles in length, were completed, as aforesaid, your orator so reported to the President of the United States; and thereupon said President has appointed three commissioners to examine the same; and it appearing to said commissioners that said sections of railroad and telegraph line were constructed in a good, substantial and workmanlike manner, they have so reported to the President of the United States, and their reports have been approved by said President. That every portion of said line so constructed, has been so examined, approved and accepted.

And your orator further shows, that it has, ever since the construction of its said railroad, as hereinbefore set forth, maintained and operated, and still continues to maintain and operate, each and every portion of said line so constructed.

IX.

And your orator further shows that under and by virtue of said act of Congress approved July 2, 1864, and the acts and joint resolutions supplementary thereto and amendatory thereof, and its compliance therewith as aforesaid, your orator became the owner of the said lands described in the schedules hereunto annexed, and has

ever since remained, and now is, the owner thereof; that it has n sold or relinquished said lands, or taken any indemnity in li thereof; and it now has the title thereto vested in it by virtue said act of Congress; and is seized thereof in fee-simple; that sa lands are of the value of over twenty-five thousand ($25,000) d lars.

X.

And your orator further shows, that in and by an act of Congre entitled, "An act granting public lands to the State of Wisconsi to aid in the construction of railroads in said State," approved Ju 3, 1856, there was, among other thin granted to the State of Wisconsin, f the purpose of aiding in the constru tion of a railroad from Madison or C lumbus by the way of Portage city to St. Croix river or lake, betwe townships twenty-five and thirty-one, and, thence to the west en of Lake Superior and to Bayfield, every alternate section of lan designated by odd numbers, for six sections in width on each sid of said road.

Bill of complaint. 9
Filed May 3, '93.

And it was further provided in said act, that in case it shoul appear that the United States had, when the line of said road wa definitely fixed, sold any sections or parts thereof granted, as afor said, or that the right of pre-emption had attached to the sam then it should be lawful for any agent or agents, to be appointe by the governor of the State to select, subject to the approval o the Secretary of the Interior, from the lands of the United State nearest to the tiers of sections or parts of sections above specifie so much land in alternate sections or parts of sections, as shoul be equal to such lands as the United States had sold or otherwis appropriated, or to which the right of pre-emption had attached And that said lands so selected and located in lieu of those sol and to which the right of pre-emption had attached, as aforesaid together with the sections and parts of sections designated by od numbers as aforesaid, and appropriated as aforesaid, should b held by the State of Wisconsin for the use and purpose aforesai provided that the lands to be so located should in no case be furthe than fifteen miles from the road, and selected for and on account o such road.

And it was further provided in and by said act of Congress tha the land thereby granted should be exclusively applied to the con struction of the road for which they were granted and selected, an should be disposed of only as the work progressed; and the same should be applied to no other purpose whatever.

And it was further provided in and by said act of Congress, tha the lands thereby granted to said State should be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other, and should be disposed of by said State in the manner following, that is to say: that a quantity of land, not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of road might be sold, and when the governor

of said State should certify to the Secretary of the Interior that any twenty continuous miles of said road was completed, then another like quantity of land thereby granted might be sold, and so from time to time, until said road was completed, and if said road was not completed within ten years, no further sales should be made, and the lands unsold should revert to the United States.

Bill of complaint. 10
Filed May 3, '93.

And your orator further shows, that the legislature of the State of Wisconsin, by an act entitled "An act to accept the grant and execute the trust conferred upon the State of Wisconsin, by an act of Congress entitled, 'An act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State' approved June 3rd, 1865," approved October 18th, 1856, duly accepted said grant upon the terms, conditions and restrictions contained in said act of Congress and assumed and undertook to execute the trust created by said act of Congress.

And your orator further shows, that for the purpose of executing the trust created by said act of Congress accepted by the State of Wisconsin, as aforesaid, the legislature of said State, by an act entitled "An act to grant certain lands to the La Crosse & Milwaukee Railroad Company, and to execute the trust created by an act of Congress entitled 'An act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State' approved June 3, 1856" approved October 11, 1856, duly incorporat*ion* the La Crosse & Milwaukee Railroad Company, and authorized and empowered it to survey, locate, construct, complete and perpetually to have, use, maintain, and operate railroads with one or more tracks or lines from the city of Madison, in the county of Dane, and from the village of Columbus, in the count- of Columbia, on a most direct and feasible route by the way of Portage city to the St. Croix river or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield.

And in and by said last-mentioned act the said legislature, for the purpose of aiding in the construction of said railroads, granted to said La Crosse & Milwaukee Railroad Company, all the interest and estate, present or prospective, of said State of Wisconsin, to aid in the construction of a railroad from Madison or Columbus, by the way of Portage city, to the St. Croix river or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, by said act of Congress approved June 3, 1856; provided that the said lands should be exclusively applied in the construction of that road for which it was granted, and should be disposed of only as the work progresses; and should be applied to no other work whatever. And it was further provided in and by said last-mentioned act, that the location and designation of the route and the line of the said roads should be made by the said La Crosse & Milwaukee Railroad Company, and the same should

Bill of complaint. 11
Filed May 3, '93.

from time to time, and as fast as practicable, be reported to the governor of the said State and that the selections of land provided for in the acts of Congress above mentioned should be made by such agents as might be appointed by the governor of said State.

And your orator further shows, upon its information and belief, that the said La Crosse & Milwaukee Railroad Company, was, immediately after the passage of the said last-mentioned act of the legislature of Wisconsin, duly organized as a corporation, in pursuance of said act, and duly accepted the grants thereby made. And that the said La Crosse & Milwaukee Railroad Company located the line of its railroad by the most direct and feasible route from Madison, in the county of Dane, and from Columbus, in the county of Columbia, by way of Portage city to the St. Croix river or lake, between townships twenty-five and thirty-one; and that a map of the line of location of said road, fixing the point of commencement or southerly terminal point of said road at Madison, was made and duly authenticated and filed with the Secretary of the Interior of the United States, at Washington.

XI.

And your orator further shows, that by an act entitled "An act to amend an act entitled 'An act to incorporate the St. Croix & Lake Superior Railroad Company' approved February 24, 1854" approved March 6, 1857, the said St. Croix & Lake Superior Railroad Company, a corporation created under said act of the legislature of Wisconsin, approved February 24, 1854, was, among other things, authorized and empowered to locate, construct, maintain and operate a railroad from any point or place on the St. Croix river or lake, southerly of township twenty-seven, and northerly of township twenty-five, to the west end of Lake Superior, and to Bayfield.

And it was further declared by said act to be lawful for said La Crosse & Milwaukee Railroad Company, to grant and convey to said St. Croix & Lake Superior Railroad Company, and said last-named company to receive, all the right, title and interest of said La Crosse & Milwaukee Railroad Company in and to that portion of the lands theretofore granted to said last-named company which lie north of the point or place where the road of the last-named company should intersect the St. Croix river or lake, or such other point as should be fixed by said La Crosse and Milwaukee Company, or such portion of said lands as said companies should agree.

Bill of complaint. 12
Filed May 3, '93.

And it was further provided, that whenever such conveyances should be made, the said St. Croix & Lake Superior Railroad Company should possess all the rights, powers and privileges in regard to the construction and operation of said road from the point so determined upon, to the west end of Lake Superior and to Bayfield; and in regard to the application and disposal of said land; and should be subject to the same liabilities, duties and conditions and restrictions as were conferred or imposed upon, or required of said

La Crosse & Milwaukee Railroad Company, by said act of October 11, 1856.

And your orator further shows, that said railroad companies duly accepted and assented to the provisions of said act, and that, pursuant to the authority thereby conferred, the said La Crosse & Milwaukee Railroad Company assigned and conveyed to the said St. Croix & Lake Superior Railroad Company, that portion of said land grant applicable to that part of said railroad line extending from the St. Croix river or lake between townships twenty-five and thirty-one, to the west end of Lake Superior and to Bayfield.

XII.

And your orator further shows, that May 29, 1856, the Commissioner of the General Land Office, in anticipation that said act of Congress thereafter approved, to wit: June 3, 1856, would become a law, telegraphed to the register and receiver of the United States district land office at La Crosse, Hudson, Mineral Point, Menasha, Stevens' Point and Superior, all in Wisconsin, as follows, to wit:

"You will suspend from sale and location all the lands in your district until further orders."

That the lands described in the schedules hereto annexed were at said time, and at all times until October, 1860, in the United States land district of Superior. That thereafter, to wit: June 12, 1856, said Commissioner, by letters addressed to the registers and receivers of said district land office, instructed said officers to continue the reservation until otherwise directed.

That thereafter, to wit: June 19, 1856, the said Commissioner vacated said order of withdrawal and advised the said register and receiver that settlements were authorized upon any of said lands so withdrawn and that the right of pre-emption might be acquired thereto up to the time the line of said road should be definitely fixed.

That thereafter, the president of said St. Croix & Lake Superior Railroad Company, having transmitted to the Commissioner of the General Land Office plats showing the line of said road, from a point near Prescott on the Lake St. Croix to Superior, and also the line of the said Bayfield branch, as definitely located, and said plats having been approved by the Secretary of the Interior the same were, September 20, 1858, duly filed in the office of the Commissioner of the General Land Office.

That thereafter all the public lands in odd-numbered sections coterminous with and within fifteen miles of said line were reserved for said railroad by order of the Commissioner of the General Land Office. That the lands described in the schedules hereunto annexed are coterminous with said line from Lake St. Croix to Superior so definitely fixed, but are more than fifteen miles therefrom.

XIII.

And your orator further shows, that by an act approved May 5, 1864, entitled "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin," Congress granted to said State for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake, between the townships twenty-five and thirty-one, to the west end of Lake Superior and from some point on said railroad, to be selected by said State, to Bayfield, every alternate section of public land designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose by the act of Congress of June 3, 1856, upon the same terms and conditions as were contained in the act granting lands to aid in the construction of railroads in said State, approved June 3, 1856. And it was further provided in said act, that in case that it should appear that the United States had, when the lines of said road were definitely fixed, sold, reserved, or otherwise disposed of, any sections or parts thereof granted as aforesaid, or that the right of pre-emption or homestead had attached to the same, then it would be lawful for any agent or agents to be appointed by said company, to select, subject to the approval *to* the Secretary of the Interior, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections, as should be equal to such lands as the United States had sold or otherwise appropriated, or to which the right of pre-emption or homestead rights had attached as aforesaid, which lands, (thus selected in lieu of those sold and to which pre-emption or homestead rights had attached as aforesaid), should be held by said State for the use and purpose aforesaid; provided, that the lands to be so located, should in no case be further than twenty miles from the line of said road; nor should said selection or location be made in lieu of lands received under the said grant of June 3, 1856, but such selection and location might be made for the benefit of said State, and for the purpose aforesaid, to supply any deficiency under the said grant of June 3, 1856, should any such deficiency exist. And it was by that act further provided that the time fixed and limited for the completion of said roads in said act of June 3, 1856, should be extended to a period of five years from and after the passage of said act of May 5, 1864.

Bill of complaint. 14
Filed May 3, '93.

And it was further provided, that whenever the companies to which said grant was made or to which the same might be transferred, should have completed twenty consecutive miles of any portion of said railroad with all necessary drains, etc., and other appurtenances of a first-class railroad, patents should issue conveying the right and title to said lands to the said company entitled thereto, on each side of said road so far as the same was completed, and coterminous with said completed section, not exceeding the amount aforesaid; and patents should in like manner issue for any of said

lands unless there should be presented to the Secretary of the Interior a statement verified on oath or affirmation by the president of said company, and certified by the governor of the State of Wisconsin, that such twenty miles had been completed as required by said act, and setting forth with certainty the points where such twenty miles began and where the same ended.

And it was further provided, that the said lands granted should, when patented as in said act provided, be subject to the disposal of the company entitled thereto for the purposes aforesaid and no other.

15

XIV.

Bill of complaint. Filed May 3, '93.

And your orator further shows, that the State of Wisconsin by a joint resolution duly adopted and approved March 20, 1865, accepted the lands granted to said State by said acts of Congress approved May 5, 1864, subject to the conditions of said act of Congress; and consented to execute the trust created by said act pursuant to the terms, limitations and conditions of said act.

And said State, by an act entitled "An act to confer upon the St. Croix and Lake Superior railroad all the rights and privileges granted and conferred to the State of Wisconsin, by acts of Congress approved June 3, 1856, and May 5, 1864," approved March 20, 1865, granted and conferred upon the said St. Croix & Lake Superior Railroad Company, all the lands, rights and privileges granted and conferred to the State of Wisconsin, in the grant of lands for the purpose of aiding in the construction of a railroad from the St. Croix river or lake to the west end of Lake Superior and to Bayfield, by the act of Congress approved May 5, 1864; and also confirmed all the lands, rights and privileges theretofore granted and conferred by said State to and upon said company to aid in the building said road as above described, which were embraced in the act of Congress granting lands to the State of Wisconsin, approved June 3, 1856, and provided that the point of intersection of the said Bayfield branch should be and remain where it had theretofore been fixed, provided, that said grant should be subject to all the conditions and restrictions imposed upon the State by said act of Congress respectively. And said State by an act entitled "An act to aid the St. Croix and Lake Superior Railroad Company in reaffirming the grant of public lands by act of Congress, approved June 3, 1856, and other purposes," approved March 20, 1865, confirmed and granted to said St. Croix & Lake Superior Railroad Company, all the rights and privileges, interest and immunities to that portion of the lands granted to the State of Wisconsin to aid in the construction of railroads by said act of Congress approved June 3, 1856, for the purpose of aiding in building a railroad from the River or Lake St. Croix, between townships twenty-five and thirty-one to the west end of Lake Superior and to Bayfield, in said act mentioned.

XV.

Bill of complaint. 16
Filed May 3, '93.

And your orator further shows, that April 22, 1865, at a meeting of the executive committee regularly called, the said St. Croix and Lake Superior Railroad Company, by a resolution duly adopted accepted the grant of land made by Congress to the State of Wisconsin, to aid in the construction of a railroad from the St. Croix river or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior and to Bayfield, by said act of Congress approved May 5, 1864; and the act of the legislature of the State of Wisconsin, conferring the same on said St. Croix & Lake Superior Railroad Company, by said act approved March 20, 1865. And said executive committee at said meeting, by resolution adopted as the line for the selection of lands conferred on said company by said grants, the line as theretofore located by maps on file in the Land Office at Washington, D. C.

That May 5, 1865, D. A. Baldwin, for and on behalf of said company, transmitted copies of the act of Wisconsin conferring said grant upon said St. Croix & Lake Superior Railroad Company and its resolutions accepting the same and adopting the line theretofore fixed as the line of location of the road under said act of Congress approved May 5, 1864, to the Commissioner of the General Land Office, and requested that said lands be withdrawn from market in compliant- with said grants.

And your orator further shows, that February 28, 1846, the Commissioner of the General Land Office forwarded to the register and receiver of the United States district land office for the district of Bayfield, Wisconsin, a diagram showing the line of the said St. Croix & Lake Superior railroad so definitely fixed as aforesaid, with the ten and twenty mile limit of the land grant designated thereon, and directed said register and receiver to withhold the odd-numbered sections of public land within said limits from sale or location, pre-emption, settlement or homestead entry. That said diagram and instructions were received at the said district land office and filed March 17, 1866. That the lands described in the schedules hereunto annexed were within the twenty-mile limits of said withdrawal.

XVI.

And your orator further shows, that said St. Croix & Lake Superior Railroad Company failed to construct said railroad from said point on St. Croix lake or river between townships twenty-five and thirty-one, to the west end of Lake Superior, or from said point on said road to Bayfield, or any portion of said roads or in anywise to do anything to earn said grants.

Bill of complaint. 17
Filed May 3, '93.

That thereafter such proceedings were had and taken by the legislature of said State, that said grants so made to said St. Croix and Lake Superior Railroad Company, were resumed by said State; and that said State, being then vested with said

grants, and having full right and authority so to do, by an act approved March 4, 1874, entitled "An act to confer certain lands upon the North Wisconsin Railway Company and the Chicago and Northern Pacific Air Line Railway Company, and to execute the trust assumed by the State of Wisconsin, by its acceptance of the grants of land made by Congress by acts approved June 3, 1856, and May 5, 1864," granted to the Chicago and Northern Pacific Air Line Railway Company, a corporation organized and existing under the laws of Wisconsin, all the rights, title and interest which said State had, or might thereafter acquire in and to said lands granted to said State by said acts of Congress of June 3, 1856, and May 5, 1864, which were or could be made applicable to the construction of that part of the road of said company lying between the west end of Lake Superior and the intersection of the Bayfield branch with said line of railway extending to the west end of Lake Superior, as shown on the maps of the definite location of said railway filed in the office of the Commissioner of the General Land Office as hereinbefore set forth; said lands were granted to said company upon certain conditions in said act enumerated, to which, for greater certainty, your orator begs leave to refer.

And your orator further shows that by said act approved March 4, 1874, the legislature of the said State granted to said North Wisconsin Railway Company, all the rights, title and interest which said State had or might thereafter acquire in and to said lands granted to said State by said acts of Congress approved June 3, 1856, and May 5, 1864, to aid in the construction of a railroad from the St. Croix lake or river, between townships twenty-five and thirty-one to the west end of Lake Superior, and to Bayfield, except those granted to said Chicago & Northern Pacific Air Line Company, said grant being for the purpose of enabling the said North Wisconsin Railway Company to complete the railroad from the St. Croix river or lake to Bayfield; said grant was so made upon certain conditions in said act set forth, to which, for greater certainty, your orator begs leave to refer. And it was further provided in and by said act that the governor of said State should, upon presentation to him of satisfactory proof that the first forty continuous miles of said railroad had been completed in accordance with said act of Congress and said act of the State of Wisconsin, issue and deliver or cause to be issued and delivered to said company, patents from said State for five hundred and twenty sections of land; and thereafter upon the completion of any twenty continuous miles he should issue and deliver or cause to be issued and delivered, to said company, patents in due form for two hundred sections of land.

Bill of complaint. 18
Filed May 3, '93.

And your orator further shows, that said North Wisconsin Railway Company duly accepted said grant, and soon thereafter constructed and completed a large portion of said railroad.

XIX.

And your orator further shows, that on or about June 1, 1880, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, succeeded to all the rights, title, interest, claims and privileges of said North Wisconsin Railway Company, in and to said railroad from the St. Croix river or lake to Bayfield, and in and to said land grants. And that thereafter said Chicago, St. Paul, Minneapolis & Omaha Railway Company proceeded with the construction of said road, and prior to the — day of —— 1883, completed the same as required by the said acts of Congress approved June 3, 1856, and May 5, 1864, and the act of said State of Wisconsin, and thereby became entitled to all the grants, rights, privileges and immunities conferred upon said State of Wisconsin by said acts of Congress so far as the same were applicable to that portion of said railroad.

XX.

And your orator further shows, that by a resolution of the stockholders of said company duly adopted at a regular meeting held on or about June 10, 1874, the name of said Chicago & Northern Pacific Air Line Railway Company was changed to Chicago, Portage & Superior Railway Company. That said Chicago, Portage & Superior Company having failed to comply with the conditions of said act approved March 4, 1874, the said State of Wisconsin, by an act approved February 16, 1882, entitled, "An act to revoke, annul and resume the grant of lands made by chapter 126 of the Laws of Wisconsin for the Year 1874, to the Chicago & Northern Pacific Air Line Railway Company (now the Chicago, Portage & Superior Railway Company) and to repeal sections 8, 9 and 10 of said chapter 126, and to confer said grant of lands upon the Chicago, St. Paul, Minneapolis & Omaha Railway Company," revoked and annulled the grant of lands made to the Chicago & Northern Pacific Air Line Railway Company (at the date of said act the Chicago, Portage & Superior Railway Company) by said act of the legislature of Wisconsin, approved March 4, 1874; and granted said lands to the said Chicago, St. Paul, Minneapolis & Omaha Railway Company upon the terms and conditions in said act set forth, to which, for greater certainty, your orator begs leave to refer.

Bill of complaint. 19
Filed May 3, '93.

And it was further provided in and by said act that the governor of said State should, upon the presentation to him of satisfactory proof of the completion of twenty miles of said railroad from the point of intersection of the railroad from the St. Croix river or lake to the west end of Lake Superior with the Bayfield branch as fixed by the surveys and maps on file in the General Land Office in Washington, to the west end of Lake Superior, in accordance with the act of Congress of June 3, 1856, and May 5, 1864, granting lands to said State to aid in the constructions of railroads and of said act of the legislature of the State of Wisconsin, approved February 16,

1882, issue and deliver or cause to be issued and delivered to said company, patents for all lands applicable under said acts of Congress to said twenty miles of complete road, and thereafter, upon the completion by said company of twenty continuous miles of its said railroad, he should issue and deliver or cause to be issued and delivered, patents for the residue of the lands so granted. And it was further provided in and by said act that sections 8, 9 and 10 of said chapter 126 of the Laws of 1874, and all acts and parts of acts in any manner contravening or conflicting with the provision of said act, should be repealed; that said sections of the act of 1874 so repealed, were the portion of said act granting said lands to the said Chicago Northern Pacific Air Line and Railway Company.

And your orator further shows, that said Chicago, St. Paul, Minneapolis & Omaha Railway Company accepted said grant, and thereafter and prior to the — day of ——, 1882, completed said railroad as required by said acts of Congress of June 3, 1856, and May 5, 1864, and thereby became entitled to all the grants, rights, privileges and immunities conferred upon said State of Wisconsin, by said act of Congress so far as the same were applicable to that portion of said railroad extending between the west end of Lake Superior and the intersection of said road with the Bayfield branch.

20

XXI.

Bill of complaint, filed May 3, '93.

And your orator further shows, that May 12, 1883, the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, claiming the right so to do under said acts of Congress approved June 3, 1856, and May 5, 1864, filed a list of lands in the United States district land office at Bayfield, Wisconsin, in which land district said lands were situate, purporting to select the lands described in said list (being a part of the lands described in Schedules A and B with other lands) as inuring to it under the said acts of Congress. That said list was approved and filed by the register and receiver of said land office for the district of Bayfield and transmitted to the Commissioner of the General Land Office for his approval. That Exhibit "O" hereunto attached is a true and correct copy of said list so filed (omitting therefrom the lands not involved in this section) and of the allowance thereof by the said register and receiver.

And your orator further shows, that June 14, 1883, the said Chicago, St. Paul, Minneapolis & Omaha Railway Company filed another list of lands in said land office, in which land district said lands were, purporting to select the lands described in said list (being the remainder of the lands described in Schedules A and B with other lands) as inuring to it under said acts of Congress. That said list was approved and filed by the register and receiver of said land office; and transmitted to the Commissioner of the General Land Office for his approval. That Exhibit "P" hereunto attached is — true and correct copy of said list so filed, (omitting therefrom the lands not involved in this action,) and of the allowance thereof by the said register and receiver.

XXII.

And your orator further shows, that on or about July 9th, 1883, the governor of said State of Wisconsin caused a patent from said State for certain lands, including, among others, a portion of the lands described in the Schedules A and B hereunto annexed, to be issued and delivered to said Chicago, St. Paul, Minneapolis & Omaha Railway Company, and thereafter, to wit: on or about February 14, 1884, the said governor caused another patent from said State for certain other lands, including among others, the remainder of the lands described in said schedules, to be issued and delivered to said railway company.

Bill of complaint. 21
Filed May 3, 1893.

And your orator further shows, that at the time said patents were so issued and delivered, the said selections of the lands described in said schedules hereunto annexed had not been approved by the Commissioner of the General Land Office, or the Secretary of the Interior; and that said selections have never been so approved, or approved at all except as hereinbefore set forth.

And your orator further shows, the said State of Wisconsin had not, nor has had, any right, title or interest in or to said lands.

XXIII.

And your orator further shows, that February 17, 1885, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, made, executed and delivered its certain deed wherein and whereby it purported to grant, bargain, sell and convey unto F. Weyerhauser, F. C. Denkman, Peter Musser, P. M. Musser, William Sauntry, Albert Tozer, Charles R. Ainsworth and John M. Gould the lands described in Schedule A hereunto annexed, together with other lands. And on said day the said grantees named in said deed, made, executed and delivered a certain mortgage on said described lands wherein and whereby they mortgaged the same to said railway company to secure the payment of certain notes given by said mortgagors to said railway company for a part of the purchase price of said lands. That said mortgage was on or about April 11, 1885, recorded in Book D of Mortgages on page 614 *et seq.* in the office of the county recorded of Douglas county, Wisconsin; and as your orator is informed and believes, yet remains of record an apparent lien upon said lands.

That thereafter, to wit: September 1, 1886, F. Weyerhauser and wife, F. C. A. Denkman and wife, Peter Musser and wife, P. M. Musser and wife, William Sauntry and wife, Albert Tozer and wife, Charles R. Ainsworth and wife, John M. Gould and wife, and Dimock, Gould & Co., a body corporate, made, executed and delivered a certain instrument in writing wherein and whereby they purported to convey the said lands described in Schedule A, together with other lands, to said defendant, The Musser-Sauntry Land, Logging & Manufacturing Company; and said defendant in said instrument agreed to assume, agreed to pay, and adopted said

mortgage as its own debt and obligation, and agreed to protect said grantors and each of them, against the payment of each and every note and obligation given by said grantors or any of them, for or on account of the purchase price of said lands and parts thereof.

22 XXIV.

Bill of complaint. Filed May 3, 1893.

And your orator further shows, that July 15, 1886, the said Chicago, St. Paul, Minneapolis and Omaha Railway Company made and executed and delivered its certain deed wherein and whereby it purported to grant, bargain, sell and convey unto Artemus Lamb, unto F. C. Weyerhauser and F. C. A. Denkman, unto Peter Musser and P. M. Musser, unto John M. Gould and Charles R. Ainsworth, unto William Sauntry and Albert Tozer, the lands described in Schedule B hereunto annexed, together with the other lands.

That on said day the grantees in said deed named, made, executed and delivered a certain mortgage on said described lands, wherein and whereby they mortgaged the same to said railway company to secure the payment of certain notes given by said mortgagors to said railway company for a part of the purchase price of said lands. That said mortgage was, to wit: October 11, 1886, recorded in Book E of Mortgages, on page 197 *et seq.* in the office of the county recorded of Douglas county, Wisconsin, and as your orator is informed and believes yet remains of record an apparent lien upon said lands.

That thereafter, to wit: June 27th, 1888, the said F. Weyerhauser and wife, F. C. A. Denkman and wife, John M. Gould and wife, Charles R. Ainsworth and wife, Peter Musser and wife, Peter M. Musser and wife, William Sauntry and wife, and Albert Tozer and wife, made, executed and delivered their certain instrument in writing wherein and whereby they purported to convey all their right, title and interest in and to said lands described in Schedule "B," together with other lands, to the said defendant, Musser-Sauntry Land, Logging & Manufacturing Company.

Thereafter, to wit: on or about November 19, 1889, the said Artemus Lamb and his wife, made, executed and delivered their certain instrument in writing, purporting to quitclaim to said Musser-Sauntry Land, Logging & Manufacturing Company, their interest in and to said lands described in Schedule "B," together with other lands.

And your orator further shows, that all of said patents, deeds and instruments hereinbefore referred to were recorded in the office of the county recorded of Douglas county, Wisconsin, that being the county in which such lands are situate.

Bill of complaint. Filed May 3, '93. 23

And, as your orator is informed and believes, that said deeds and instruments yet appear of record; and that it appears therefrom that the title in and to said lands is vested in said defendant, Musser-Sauntry Land, Logging & Manufacturing Company, subject to said mortgages in favor of said defendant, Chicago, St. Paul, Minneapolis & Omaha Railway Company.

XXV.

And your orator further shows, that thereafter the Secretary of the Interior proceeded with the adjustment of said land grant made by said acts of Congress approved June 3, 1856, and May 5, 1864, and patented to said Chicago, St. Paul, Minneapolis & Omaha Railway Company the lands applicable under said acts of Congress and the laws of the State of Wisconsin, to that portion of said railroad extending from Lake St. Croix to the west end of Lake Superior; and of said branch to Bayfield; and it was thereupon ascertained and determined that said Chicago, St. Paul, Minneapolis & Omaha Railway Company had selected a far greater area of lands as inuring to it under said acts of Congress, than, in law and fact, did so inure to it. And it further appeared that there were public lands in odd-numbered sections selected or subject to be selected by said company in lieu of lands within six and ten miles of the line of definite location of said road so fixed, and which were sold, reserved, or otherwise disposed of, or to which the right of pre-emption or homestead had attached, at the dates of said grants or of the definite location of said road in quantities sufficient to enable said company to get indemnity in lieu of all lands so lost from said grants, which were nearer to the line of said road as definitely fixed, and to the lands excepted from said grant in lieu of which such indemnity was to be taken, than the lands described in said Schedules "A" and "B." And your orator is informed and believes said railway company, did, on or about November 25, 1889, relinquish the lands described in said schedules with other lands and requested that the selection be canceled, as to these lands, and your orator shows, on its information and belief, said selections were so canceled on or about February 11, 1890; and that other lands were by the United States patented for said railway company in place of all lands in odd-numbered sections or parts of sections within six and ten miles of the lines of said road as definitely fixed, which were sold, reserved, or otherwise disposed of, or to which the right of pre-emption or homestead had attached at the dates of said grants and of the definite location of said line. And after all the lands inuring to said company by virtue of said grants and the construction of said railroads had been patented to it by the United States, the Secretary of the Interior directed the Commissioner of the General Land Office to vacate the orders of withdrawal of lands theretofore made under said grants for indemnity purposes as hereinbefore set forth, and to restore said lands to the public domain, and open them to settlement under the general land laws. Said direction was so given on or about February 11, 1890. That said direction was thereafter and before the Commissioner had revoked said withdrawals suspended.

XXVI.

And your orator further shows, that prior to the cancellation of the selections of the lands described in said Schedules "A" and "B"

hereunto annexed, to wit, on or about December 18, 1889, the said defendant, Musser-Sauntry Land, Logging & Manufacturing Company, having, as your orator is informed and believes, been advised by said railway company that said lands described in said Schedules "A" and "B" with other lands theretofore conveyed to said logging and manufacturing company by said railway company and certain of its grantees, would not inure to said railway company under said acts of Congress and of the legislature of the State of Wisconsin, applied to purchase said lands from the United States under the provisions of an act of Congress approved March 3, 1887, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," claiming and pretending that such lands were excepted, from said grants of 1856 and 1864; and that said defendant was entitled to purchase the same under the provisions of said act as a *bona fide* purchaser from said railway company; and tendered to the receiver of said United States district land office for the district of Ashland, (in which district such lands have since 1886, been situated) the ordinary Government price for such lands. That your orator protested against the allowance of said application; but the register and receiver of said land office, disregarding your orator's protests, wrongfully and without authority so to do, allowed said application; and the said receiver accepted the price for said lands so tendered. That thereafter your orator duly appealed from the action of said register and receiver to the Commissioner of the General Land Office.

XXVII.

Bill of complaint. 25
Filed May 3, '93.

And your orator further shows, that in a certain letter, dated February 11, 1890, transmitting to the Commissioner of the General Land Office certain lists of lands approved as inuring to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, under said acts of Congress approved June 3, 1856, and May 5, 1864, and declaring said grants to be adjusted, the Secretary of the Interior made the following ruling and decision of law, viz:

"The lands in list 15 are stated to be within the primary limits of the grant to the Northern Pacific Railroad Company, under its grant of July 2, 1864 (13 Stat., 365). They are also stated to be within the primary limits of the unconstructed portion of the Wisconsin Central railroad, between Ashland and Superior, being likewise within the fifteen-miles limit of the Omaha grant under the act of 1856. As before stated the question of the right of the Wisconsin railroad within these limits has heretofore been decided adversely to that company by this department, which decision was subsequently and very recently adhered to. The same reasoning, as to the exclusion of the Central Company from those limits, might apply with equal force, perhaps, to the Northern Pacific Railroad Company.

"Therefore, I see no reason why said apparent conflicts should not be disregarded and the lists approved. Entertaining these views, I have, this day, approved list 14 for 21,810.69 acres and list 15 for 9,083.91 acres, which are herewith sent you."

And thereafter, to wit: December 19, 1890, the Secretary of the Interior made the following decision of law and directed the Commissioner of the General Land Office as follows, to wit:

"On February 12, 1890, I approved for patent lists 13, 14 and 15 of lands for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, and sent them to you, with a letter of instructions bearing even date. 10 L. D., 147.

"Before any action was taken by your office in the premises you were verbally directed to return said lists and letters of instruction to me; which was accordingly done. The reasons which actuated me in thus suspending action as above stated, no longer existing I herewith forward to you said lists and letter, with directions to carry out the instructions in said letter as modified herein.

Bill of complaint. Filed May 3, 1893. 26

"You were informed that this action closed the adjustment of the congressional land grants for the benefit of said road and you were directed to restore to the public domain and throw open to settlement the surplus lands theretofore withdrawn for indemnity purposes, under the grants for said road. It was provided, however, that the order of restoration shall not effect rights required within the primary or granted limits of any other congressional grant;" nor "take effect or be so construed as to authorize the acquisition or recognition of any rights to said lands or any portion thereof until thirty days after notice thereof, through advertisement, shall have been previously given by the officers of the district land office."

"Afterwards two letters were received from you, dated respectively the 10th and 14th of February last, in relation to the revocation of said withdrawal. In the letter of the 10th, which was received after mine of the 12th was sent, you call attention to the fact that of the surplus lands to be restored a portion lie within the fifteen-mile or indemnity limits of the Omaha grant, under the act of June 3, 1856, (11 Stat., 20) and a portion within the twenty-miles or indemnity limits of the grant to said company under the act of May 5, 1864, (13 Stat., 66) and that the primary limits of the Wisconsin Central railroad, under the same grant of May 5, 1864, *supra*, and the primary limits of the Northern Pacific railroad, under its grant of July 2, 1864, (13 Stat., 365), in regard to a portion of said lands, overlap the aforesaid limits of the Omaha road; and you desire a determination of the respective rights of the different roads within these conflicting or overlapping limits.

"Upon particular inquiry at, and a more careful examination into the matter by, the railroad division of your office, it is learned that there will be no surplus lands within the fifteen-miles limits of the Omaha road, which are covered by the primary limits of the Northern Pacific railroad, such lands having been dealt with in the adjustment heretofore made. But there are lands within the

twenty-miles limits which are covered by the primary limits of the Northern Pacific railroad, as stated by you.

"As before said, the Omaha grant was made May 5, 1864; that of the Northern Pacific July 2, 1864; and the indemnity withdrawal of the Omaha Company was made February 28, 1866, and the definite location of the Northern Pacific on July 2, 1882. Consequently, at the date of the definite location, the lands in question were set apart by executive order for the indemnity purposes of the Omaha grant. And the question is, Did this condition except them from the operation of the Northern Pacific grant?

Bill of complaint. 27
Filed May 3, '93.

"The third section of Northern Pacific act grants the designated section, on each side of the railroad—'whenever, on the line thereof, the United States have full title not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by the company in lieu thereof,' etc.

"The force and effect of an executive withdrawal, for indemnity purposes under one grant, in excepting lands from the subsequent attachment of rights under another grant, have been fully and exhaustively discussed by this department in several cases arising under this Omaha grant. See cases of Chicago, St. Paul, Minneapolis & Omaha R'y Co., 6 L. D., 195; Wisconsin Central R. R. Co., 10 L. D., 63; which cases are quoted and the rulings therein concurred in by Mr. Justice Harlan, in the opinion of the court in the unreported case of The Wisconsin Central R. R. *vs.* Forsythe, decided last September in the U. S. circuit court for the western district of Wisconsin.

"In pursuance of those decisions, I must hold that the lands in question were at the date of the definite location of the Northern Pacific 'reserved' and 'otherwise appropriated,' and consequently excepted from said grant. Therefore, there is no proper conflict with rights of the Northern Pacific in the described limits.

"This disposes of the questions in relation to the conflicts described in your letter of the 10th of February.

"But in that letter and the one four days later, it is stated that a large portion, if not all, of the surplus land within the indemnity limits of the Omaha grant, about to be restored to the public domain, is 'covered by claims based upon settlements made during the last year or two, growing out of applications to enter, presented and rejected during that period;' and that, it has also come to your knowledge 'the company had, years ago, disposed of a large amount of these lands,' the transferees of some of which have been permitted 'by the local officers to make proof, and to purchase the same, under the provis

Bill of complaint. 28
Filed May 3, '93.

ions of section five of the adjustment act of March 3, 1887 (24 Stat., 557) against some of which purchases protests have been filed by parties claiming to be settlers.

"In your letter of February 14th, you also call attention to the fact that the departmental instructions, 'approving of the final adjustment of the Omaha grant and directing the restoration of the surplus land to the public domain,' made no provision for the protection of purchasers from the company under said section and act; and you invite attention to the conflicts likely to arise between the claims of such purchasers and those of parties claiming as settlers subsequent to December 1, 1882, under the second proviso of said section. And in this connection the question is asked, 'does the last proviso of the section include settlements made after the passage of the act, and, if so, might it not defeat the object of the section entirely?'

"The section and proviso referred to are as follows:

"'That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in said grant, and being coterminous with the constructed parts of the said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns: Provided: that all lands shall be excepted from the provisions of this section which at the date of such sales were in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor:

Bill of complaint. 29
Filed May 3, '93.

"'Provided further, that this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.'

"If the language of this proviso is to be taken literally it would dominate the whole section, and being repugnant to the other provisions would make the section inconsistent with and destructive of itself. The purview and scope of the section is, (1) to protect such as were in the *bona fide* occupation, under the settlement laws, of lands of the character described, at the time the same were sold by the company, and which occupants, if they have not voluntarily abandoned their claims, it is expressly declared are to be allowed to perfect proofs and receive patents; and (2) if there are no such set-

tlers or claimants then *bona fide* purchasers from the company on paying the price to the Government are to receive patents. But the second proviso, if literally accepted, changes all this, and declares that said section shall not apply to lands 'settled upon' subsequent to December 1, 1882. So that if, after adjustment of a railroad grant, it is found that surplus lands are in the occupation of claimants who were there prior to December, 1882, and had remained continually in possession, their claims could be defeated by other settlers who might go upon the land after 1882. And the same would be true as to parties who purchase from the company at a time when there was no other claimant to the land in question, and who might have extensive improvements thereon. Indeed, that proviso literally taken, would be an invitation to parties to settle upon such lands at any time in the future, and thereby defeat the equities of prior claimants.

"I cannot bring myself to believe that Congress intended to legislate to such an end. The proviso here would be treated as in the nature of a saving clause, restricting in certain cases only the operation of the more general language of the preceding clauses of the section.

"It is my opinion that said proviso applies only to the case of lands, which at the date of the passage of the act had been settled upon subsequent to December 1, 1882, by parties claiming in good faith a right to enter the same under the settlement laws, in ignorance of the right or equities of others in the premises. Such parties the law was, in my opinion, intended to protect; not those who may endeavor at any time after December 1, 1882, to 'jump' the claim of another under the pretense of an intention to enter the same; or who, in violation of the law which authorizes the placing of lands in railroads limits under reservation, for the purpose of effectuating the grant, invade the reservation in an effort to obtain precedence over other and law-abiding citizens. Such invaders cannot be regarded as acting in good faith.

Bill of complaint. 30
Filed May 3, '93.

"In your letter of February 14, it is suggested that a time be fixed within which purchasers under said act should be required to come forward, make proof and otherwise comply with the requirements thereof.

"I have no doubt of my authority, in the administration of the law, to make such a requirement, and approve of your suggestion to that effect.

"Accordingly the order theretofore issued on February 12, 1890, directing the restoration of the surplus lands heretofore withdrawn for indemnity purposes of the Omaha grant, is modified so as to extend the time when said restoration is to take effect until after ninety days' notice thereof, through advertisement, shall have been previously given by the district land officers, which advertisement shall also contain a notice to parties claiming as purchasers under said act, requiring them to come forward during said period of ninety days, submit their proof, and make payment, in pursuance

of the requirements of the official circular of February 14, 1889 (8 L. D., 348–351); and that a failure to submit proof and payment within the time named would be treated as a waiver of claim; all lands not so claimed to be subject to entry under the settlement laws by the first legal applicant at the expiration of the aforesaid period of ninety days.

"In the case of those parties who, you say, have been allowed by the local officers to make proof and purchase improvidently, that is, prior to the 'final' adjustment of this grant, they should be notified that they will be required to give a new notice, under the circular, within the prescribed period, and if, at the proper time, no adverse claimant appears, then the proof heretofore submitted, if otherwise correct, may be accepted. Notice should also be given to those parties who have made applications to enter any portion of said lands that such applications, whilst the lands were in a state of reservation, conferred upon them no right to the lands applied for; that all such applications have been rejected, and that upon the date mentioned in the notice all the restored lands will be thrown open to entry without regard to said applications."

And your orator further shows, that said ruling has since remained in full force and effect in the Interior Department, and that said department wrongfully and erroneously holds as a matter of law that all of the said lands within odd-numbered sections which were withdrawn as indemnity lands for the benefit of the grantees under said acts of Congress, approved May 5, 1864, by the said order of withdrawal of February 28, 1866, (including the lands described in said Schedules "A" and "B") were by said order, reserved and excluded from the grant to your orator, and that your orator acquired no right or title thereto under said act of Congress, approved July 2, 1864; and the said Secretary of the Interior refuses to issue to your orator patents for said lands because of said ruling, but for no other cause whatsoever.

XXVIII.

And your orator further shows, that after the said ruling of the Secretary of the Interior dated December 19, 1890, the said defendant, Musser-Sauntry Land, Logging & Manufacturing Company, under said ruling, gave a new notice by publication that it would apply at said United States district land office at Ashland, Wisconsin, to purchase from the United States certain land including the lands described in said Schedules "A" and "B," theretofore purchased from said Chicago, St. Paul, Minneapolis & Omaha Railway Company, or its grantees, claiming the right to so do under said act of Congress, approved March 3, 1887, as a *bona fide* purchaser from said railway company; and thereafter, March 5, 1891, applied to purchase said lands, offered evidence to establish its right to purchase the same under the fifth section of said act of March 3, 1887, and tendered to the receiver the purchase price therefor; and there-

after, to wit: May 5, 1891, the register and receiver approved the proof so made as satisfactory and showing the right to purchase said lands; and the receiver accepted the purchase price so tendered, and said defendant was allowed to make cash entry of said lands; but your orator shows that said lands described in Schedules "A" and "B" were not public lands open to entry at said date; but were then and there the property of your orator and to which it had full title; and that said register and receiver acted without authority of law in allowing said application and entry of said lands. And your orator shows that thereafter your orator appealed to the Commissioner of the General Land Office from such action by said register and receiver; but that thereafter, to wit: on or about October 3, 1892, the Commissioner of the General Land Office wrongfully and through ignorance of the law, held that said lands described in Schedules "A" and "B," with other lands, being withdrawn from sale or location, pre-emption, or homestead entry by said order of February 28, 1866, at the date of the definite location on your orator's road opposite thereto, were excluded from the grant to your orator by said act of July 2, 1864; and disregarding your orator's title to said lands approved the allowance of said cash entries by the register and receiver.

Bill of complaint. 32
Filed May 3, '93.

XXIX.

And your orator further shows, that said lands described in Schedules "A" and "B" have at all times herein mentioned been public lands to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption and other claims and rights, except as hereinbefore set forth; and said lands are not mineral in character.

XXX.

And your orator further shows, that said lands described in Schedules "A" and "B" are heavily timbered, and their principal value is for the timber thereon, and after the said timber is cut and removed they will be greatly impaired in value; that they are now worth over $25,000. That as your orator is informed and believes, the said defendant, Musser-Sauntry Land, Logging and Manufacturing Company, threaten and are about to enter upon said lands or authorize others to so enter upon said lands, and will as your orator verily believes, and hath reason to believe so do unless restrained by the order of your honors for the purpose of felling, cutting, removing and disposing of the timber on said lands; and will unless so restrained, cut, fell, remove and dispose of said timber, to your orator's great wrong, and will so work irreparable injury to your orator's said lands.

Bill of complaint. 33
Filed May 3, '93.

And your orator further shows, that the said patents issued by the State of Wisconsin, to said Chicago, St. Paul,

Minneapolis & Omaha Railway Company, purporting to convey said lands to said railway company; and the various mesne conveyances purporting to convey said lands from said railway company to said Musser-Sauntry Land, Logging & Manufacturing Company and the mortgages upon said lands in favor of said railroad company; and said cash entries by said logging company; and each and all of them, constitute and are a cloud upon your orator's title in and to said lands; and prevent your orator from selling or disposing of said lands and impair and destroy the value thereof as assets in your orator's hands.

And your orator further shows, that said lands have not been patented as yet, but, as your orator verily believes and hath good reason to believe, will be patented by the United States to said defendant, Musser-Sauntry Land, Logging & Manufacturing Company, under said cash entries, unless your honors enjoin and restrain said defendant from accepting or receiving said patents; and that by the issuance of such patents a further cloud will be created on your orator's title in and to said land; and that the United States will, by the issuance of patents to said defendant for said lands, deprive itself of the power and authority to issue patents therefor to your orator, as in and by said act of July 2, 1864, it hath agreed to do; and that your orator will be thereby irreparably injured.

And your orator further shows, that to quiet your orator's title in and to said lands and each of them, and to remove the clouds cast by said patents, deeds and mortgages thereon in and to said lands and each of them, will require a multiplicity of suits.

Forasmuch as your orator can have no adequate relief except in this court, and to the end that it may obtain the relief to which it is justly entitled in the premises, your orator now prays your honors to grant to it a writ of subpœna directed to the said Musser-Sauntry Land, Logging & Manufacturing Company, and The Chicago, St. Paul, Minneapolis & Omaha Railway Company, the defendants hereinbefore named, directing them and each of them to appear herein and answer, but not under oath, an answer under oath being hereby expressly waived, the several allegations in this, your orator's bill contained.

Bill of complaint. 34
Filed May 3, '93.

And your orator further prays, that it may be adjudged, determined and decreed that the lands described in said Schedules "A" and "B," are the lands of, and belong to your orator, and that your orator thereto has full title.

And your orator further prays, that it may be adjudged and decreed that the patents issued by the State of Wisconsin to the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, for said lands were issued without authority of law, and were and are void, and a cloud upon your orator's title in and to said lands; and that said railway company took no interest, right, title or claim whatsoever in or to said lands thereby; and that the said pretended conveyance of said lands and each of them made by said railway com-

pany and said pretended mortgages to said railway company upon said lands; and the said pretended conveyances of said lands to the said defendant, Musser-Sauntry Land, Logging and Manufacturing Company, and each and all of the said instruments purporting to affect the title of, or any interest in or to said described lands were, and are, so far as they purported to effect the title of or any interest in or to said described lands, null and void, that the said parties in the said instrument named, neither had nor took any interest whatsoever in or to said lands by said instruments, or any of them; and that the same and each of them constitute a cloud upon your orator's title in and to said lands.

And your orator further prays, that it may be adjudged and decreed that the cash entry of said lands by said Musser-Sauntry Land, Logging & Manufacturing Company, allowed by the register and receiver of the United States district land office as hereinbefore set forth, was so allowed without authority of law; and that said entry was and is void and a cloud on your orator's title to said lands; and that said defendant took no interest whatsoever in or to said lands, or any of them, thereby.

And your orator further prays, that a writ of injunction under the seal of this honorable court may be issued enjoining and restraining said Musser-Sauntry Land, Logging & Manufacturing Company, its agents, attorneys, servants and employees from further attempting to consummate said cash entries, or purchasing said lands, from the United States; and from taking, accepting or receiving, or authorizing others, by assignment or otherwise, to accept, take or receive any patent for said lands described in Schedules "A" and "B," or any of them, from the United States of America; and commanding the said Musser-Sauntry Land, Logging & Manufacturing Company to refuse to accept or receive any patent for said lands, or any of them, which may be tendered it by the United States, but to execute a relinquishment of the same, and file it, together with instructions to cancel such patent, with the Commissioner of the General Land Office.

Bill of complaint. 35
Filed May 3, '93.

And your orator further prays, that the said defendant, Musser-Sauntry Land, Logging & Manufacturing Company, its agents, workmen, servants and employees, may be further restrained and enjoined by the order of the honorable court from entering upon or authorizing others to enter upon said lands described in Schedules "A" and "B," hereunto annexed, and cutting, felling or removing the timber thereon, or any part of it; and from selling or disposing of the same, or any part thereof; or manufacturing it, or any of it, into saw-logs, or lumber, or any merchantable commodity; and selling or disposing of the same.

That until the final decree of this court herein, your orator have a writ of injunction issued out of and under the seal of this honorable court, directing and commanding said defendant, Musser-Sauntry Land, Logging & Manufacturing Company, its agents, attorneys, servants, employees and workmen, as herein prayed

That your orator may have such and other and further relief in the premises against said defendants and each of them, as it is just and equitable.

NORTHERN PACIFIC RAILROAD COMPANY,
By CHAS. B. LAMBORN,
Land Commissioner.
FRED. M. DUDLEY.
ROSS, DWYER & HANITCH,
Solicitors for Complainant.

STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

Charles B. Lamborn, being first duly sworn, on oath doth depose and say: that said complainant is a corporation and that he is an officer thereof, to wit, its land commissioner. That he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to his best knowledge, remembrance and belief.

CHAS. B. LAMBORN.

Subscribed and sworn to before me this 27th day of April, A. D. 1893.

P. P. STARIN,
Notary Public, Ramsey County, Minn.

36

EXHIBIT "O."

STATE OF WISCONSIN,
UNITED STATES LAND OFFICE,
BAYFIELD, *May* 12, 1883.

Exhibit "O" to bill of complaint.

The Chicago, St. Paul, Minneapolis & Omaha Railway Company, the successor of the North Wisconsin Railway Company, under and by virtue of the acts of Congress, entitled: "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," approved June 3, 1856, and "An act granting lands to the State of Wisconsin to aid in the construction of certain railroads in said State," approved May 5, 1864; and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public lands claimed by company as inuring to it, and to which it is entitled under and by virtue of the grants and provisions of said acts of Congress and the location of the line of route of the railway of said company, being on account of that portion of the railroad named in the acts of Congress, aforementioned, commencing at or near Hudson, Wis., on Lake St. Croix and ending at the west end of Lake Superior (at or near Superior city); the selections being particularly described as follows, to wit:

Subdivision of section.	No. of section.	No. of town.	No. of range.
W. ½	31	46	14
All	5	46	15
Lots 3 and 6	7	"	"
N. ½	9	"	2
S. W. ¼	11	"	"
N. E. ¼ N. E ¼	15	"	"
Lots 4 and 8	19	"	"
N. ½ & S. W. ¼	21	"	"
S. E. ¼ N. E. ¼, S. E. ¼ S. W. ¼, & S. E. ¼	23	"	"
E. ½, N. E. ¼ N. W. ¼, S. ½ N. W. ¼, S. W. ¼ S. W. ¼ & N. ½ S. W. ¼	25	"	"
S. ½, N. W. ¼ N. E. ¼, S. ½ N. E ¼, N. E. ¼ N. W. ¼ S. ½ N. W. ½	27	"	"
W. ½	29	"	"
N. E. ¼ N. E. ¼, S. ½ N. E. ¼, S. ½ N. W. ¼ & S. ½	33	"	"
N. ½, N. E. ¼ S. W. ¼, S. ½ S. W. ¼, & S. E. ¼	35	"	"

37 STATE OF WISCONSIN, }
County of Bayfield, } ss:

Exhibit "O" to bill of complaint.

I, William H. Phipps, being duly sworn, depose and say: That I am the land agent of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, (the successor of the North Wisconsin Railway Company), that the foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by said Chicago, St. Paul, Minneapolis & Omaha Railway Company as enuring to it, to aid in the construction of that portion of a railroad from the River or Lake St. Croix, between township twenty-five (25) and thirty-one (31) to the west end of Lake Superior, for which grants of land were made by the acts of Congress, approved June 3, 1856, and May 5, 1864; that the said lands are vacant, unappropriated and not interdicted mineral nor reserved lands, and are of the character contemplated by the grants, being within the limits of twenty (20) miles on each side of the line of route of said road, commencing at or near Hudson, Wisconsin, on Lake St. Croix, and ending at or near Superior city at the west end of Lake Superior.

WILLIAM H. PHIPPS (*D. S.*).

Sworn and subscribed before me this 12th day of May, A. D. 1893.

A. K. OSBORN, *Register.*

UNITED STATES LAND OFFICE,
BAYFIELD, WISCONSIN, *May* 12, 1883.

We hereby certify that we have carefully and critically examined the foregoing list of lands, claimed by the Chicago, St. Paul, Minneapolis & Omaha Railway Company, under the grants to the State of Wisconsin, by acts of Congress, approved June 3, 1856, and

May 5, 1864, and selected by William H. Phipps, the duly authorized agent; and we have tested the accuracy of said lists by the plats and records of this office and that we find the same to be correct. And we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the limits of 20 miles on each side; and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, pre-emption, State or other valid claim to any portion of said lands on file or record in this office. We further certify that the foregoing list shows an assessment of the fees payable to us allowed by the act of Congress, approved July 1, 1864, and contemplated by the circular of instructions, dated November 7, 1879, addressed by the Commissioner of the General Land Office to register- and receivers of the United States land office; and that the said company has paid to the undersigned, the receiver, the full sum of one thousand, sixteen dollars, in full payment and discharge of said fees.

Exhibit "O" to bill of complaint. 38

A. K. OSBORN, *Register.*
ISAAC H. KING, *Receiver.*

EXHIBIT "P."

Exhibit "P" to bill of complaint.

W. H. Phipps is hereby appointed agent of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, successors of the North Wisconsin Railway Company, to select the lands to which this company is entitled in the Bayfield land district of Wisconsin under the provisions of the acts of Congress, approved respectively June 3, 1856, and May 5, 1864, granting lands to the State of Wisconsin for the purposes therein named.

In witness whereof, the said railway company has caused this appointment to be signed by H. H. Porter, president, and countersigned by C. W. Porter, secretary, and its corporate seal to be affixed, this sixteenth day of October, A. D. 1882.

[CORPORATE SEAL.] (Signed) H. H. PORTER, *President.*

Countersigned:
C. W. PORTER, *Secretary.*

U. S. LAND OFFICE,
BAYFIELD, WIS., *December* 1, 1885.

We, A. K. Osborn, register, and Lloyd T. Boyd, receiver, in said land office, hereby certify that the above and foregoing is a true copy of the letters of appointment of W. H. Phipps, as agent of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, to select the lands enuring to said railway company under the acts of Congress, approved June 3, 1856, and May 5, 1864, and of the whole of said letters of appointment.

A. K. OSBORN, *Register.*
LLOYD T. BOYD, *Receiver.*

Exhibit "O" to bill of complaint.

39 UNITED STATES LAND OFFICE,
BAYFIELD, WISCONSIN, *June* 14, 1883.

The Chicago, St. Paul, Minneapolis & Omaha Railway Company, the successors of the North Wisconsin Railway Company, under and by virtue of the acts of Congress, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," approved June 3, 1856, and "An act granting lands to the State of Wisconsin to aid in the construction of certain railroads in said State, approved May 5, 1864," and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public lands claimed by said company as enuring to it and to which it is entitled under and by virtue of the grants and provisions of said acts of Congress and the location of the line of route of the railway of said company, being an account of that portion of the railroad named in the acts of Congress aforementioned, commencing at or near Hudson, Wis., on Lake St. Croix and ending at the west end of Lake Superior (at or near Superior city) the selections being particularly described as follows:

Subdivision of section.	No. of sec.	No. of town.	No. of range.
S. E. ¼ N. E. ¼, N. E. ¼ S. E. ¼, N. W. ¼, and N. W. ¼, S. W. ¼	1	44	15
E. ½, N. ½ N. W. ¼ and S. E. ¼ N. W. ¼	3	"	"
N. W. ¼ N. W. ¼	11	"	"
N. ½, W. ½ S. W. ¼, N. ½ S. E. ¼ and S. E. ¼ S. E. ¼	1	45	45
S. W. ¼ N. W. ¼, W. ½ S. W. ¼, S. E. ¼ S. W. ¼ & S. E. ¼ S. E. ¼	3	"	"
S. ½ N. E. ¼ & S. E. ¼	5	"	"
N. ½ N. E. ¼, S. W. ¼ N. E. ¼	9	"	"
N. ½ & S. W. ¼	11	"	"
S. ½ N. E. ¼, N. E. ¼ N. E. ¼, & S. E. ¼	13	"	"
All	15	"	"
N. ½ N. E. ¼, S. W. ¼ N. E. ¼, N. ½ N. W. ¼, S. E. ¼ N. W. ¼, N. ½ S. W. ¼, S. W. ¼ S. W. ¼	23	"	"
E. ½ and E. ½ N. W. ¼	27	"	"
S. ½ N. E. ¼, W. ½ & S. E. ¼	35	"	"

40 STATE OF WISCONSIN, } *ss*:
County of Bayfield, }

Exhibit "O" to bill of complaint.

I, William H. Phipps, being duly sworn, depose and say, that I am the land agent of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, the successor of the North Wisconsin Railway Company; that the foregoing list of land, which I hereby select, is a correct list of a portion of the public lands claimed by said Chicago, St. Paul, Minneapolis and Omaha Railway Company, as enuring to it to aid in the construction of that portion of a rail-

road from the River or Lake St. Croix, between townships twenty-five (25) and thirty-one (31) to the west end of Lake Superior, for which grants of lands were made by the acts of Congress, approved June 3, 1856, and May 5, 1864; that the said lands are vacant, unappropriated and not interdicted mineral nor reserved lands and are of the character contemplated by the grants, being within the limits of twenty (20) miles on each side of the line, of route of said road commencing at or near Hudson, Wisconsin, on Lake Superior and ending at or near Superior city at the west end of Lake Superior.

W. H. PHIPPS, *L. S.*

Sworn and subscribed before me this 14th day of June, A. D. 1883.

A. K. OSBORN,
Register, U. S. Land Office.

UNITED STATES LAND OFFICE,
BAYFIELD, WISCONSIN, *June* 14, 1883.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Chicago, St. Paul, Minneapolis & Omaha Railway Company, under the grants of the State of Wisconsin, by acts of Congress, approved June 3, 1856, and May 5, 1864, and selected by William H. Phipps, the duly authorized agent, and we have tested the accuracy of said lists by the plats and records of this office and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved and that the whole of said lands are surveyed public lands of the United States and within the limits of twenty miles on each side, and that the same are not nor is any part thereof returned and denominated as mineral land or lands nor claimed as swamp lands; nor is there any homestead, pre-emption, State or other valid claim to any portion of said lands on file or record in this office.

Exhibit "O" to bill of complaint. 41

We further certify that the foregoing list shows an assessment on the fees payable to us allowed by the act of Congress, approved July 1, 1864, and contemplated by the circular of instructions dated November 7, 1879, addressed by the Commissioner of the General Land Office to register and receiver of the United States land offices and that the said company has paid to the undersigned, the receiver, the full sum of two hundred and thirty-two ($232.00) dollars in full payment and discharge of said fees.

A. K. OSBORN, *Register.*
ISAAC H. WING, *Receiver.*

SCHEDULE "A"

Of lands made a part of the complaint hereto annexed, said lands being in Douglas county, Wisconsin.

Schedule "A" to Bill of Complaint.

NOTE.—In this schedule, N. stands for north, S. stands for south, E. stands for east, W. stands for west, N. E. stands for northeast, N. W. stands for northwest, S. E. stands for southeast, S. W. stands for southwest.

Subdivision of section.	No. of section.	No. of town.	No. of range. West.
S. E. ¼ N. E. ¼, N. E. ¼ S. E. ¼ N. W. ¼, and N. W. ¼ S. W. ¼	1	44	15
E. ½, N. ½ N. W. ¼ and S. E. ¼ N. W. ¼	3	"	"
N. W. ¼ N. W. ¼	11	"	"

SCHEDULE "B"

Of lands made a part of the complaint hereto annexed, said lands being in Douglas county, Wisconsin.

Schedule "B" to Bill of Complaint.

NOTE.—In this schedule, N. stands for north, S. stands for south, E. stands for east, W. stands for west, N. E. stands for northeast, N. W. stands for northwest, S. E. stands for southeast, S. W. stands for southwest.

42 Schedule "B" to bill of complaint.

Subdivision of section.	No. of section.	No. of town.	No. of range. West.
N. ½, W. ½ S. W. ¼, N. ½ S. E. ¼ and S. E. ¼ S. E. ¼.	1	45	15
S. W. ¼ N. W. ¼, W. ½ S. W. ¼ S. E. ¼ S. W. ¼, and S. E. ¼ S. E. ¼	3	"	"
S. ½ N. E. ¼ and S. E. ¼	5	"	"
N. ½ N. E. ¼ S. W. ¼ N. E. ¼	9	"	"
N. ½ and S. W. ¼	11	"	"
S. ½ N. E. ¼, N. E. ¼ N. E. ¼, and S. E. ¼	13	"	"
All	15	"	"
N. ½ N. E. ¼, S. W. ¼ N. E. ¼, N. ½ N. W. ¼ S. E. ¼ N. W. ¼, N. ½ S. W. ¼, S. W. ¼ S. W. ¼	23	"	"
E. ½ and E. ½ N. W. ¼	27	"	"
S. ½ N. E. ¼, W. ½ and S. E. ¼	35	"	"
W. ½	31	46	14
All	5	46	15
Lots 3 and 6	7	"	"
N. ½	9	"	"

Subdivision of section.	No. of section.	No. of town.	No. rang Wes
S. W. ¼	11	46	15
N. E. ¼ N. E. ¼	15	"	"
Lots 4 and 8	19	"	"
N. ½ and S. W. ¼	21	"	"
S. E. ¼ N. E. ¼, S. E. ¼ S. W. ¼, and S. E. ¼	23	"	"
E. ½, N. E. ¼ N. W. ¼, S. ½ N. W. ¼ S. W. ¼ S. W. ¼ and N. ½ S. W. ¼	25	46	15
S. ½ N. W. ¼ N. E. ¼, S. ½ N. E. ¼, N. E. ¼ N. W. ¼, & S. ½ N. W. ¼	27	"	"
W. ½	29	"	"
N. E. ¼ N. E. ¼, S. ½ N. E. ¼, S. ½ N. W. ¼ and S. ½.	33	"	"
N. ½ N. E. ¼ S. W. ¼, S. ½ S. W. ¼, and S. E. ¼	35	"	"

Whereupon a subpœna issued as follows:

43 *Subpœna.*

THE UNITED STATES OF AMERICA, }
Western District of Wisconsin, } ss:

The President of the United States of America to the Musser-Sauntry Land, Logging and Manufacturing Company & the Chicago, St. Paul, Minneapolis and Omaha Railway Company, Greeting:

Subpœna. You are hereby commanded, that you personally appear before the judges of the circuit court of the United States of America, for the western district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of June next ensuing, at Madison, to answer to a bill of complaint exhibited against you in our said court by the Northern Pacific Railroad Company.

And to do further, and receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said The Musser-Sauntry Land, Logging and Manufacturing Company, and The Chicago, St. Paul, Minneapolis and Omaha Railway Company, if to be found in his district, and due return thereof make.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Madison, in the said district, this 3rd day of May, in the year of our Lord one thousand eight hundred and ninety-three, and of our Independence the one hundred and seventeenth.

[SEAL.] F. M. STEWART, *Clerk.*

ROSS, DWYER & HANITCH,
Complainant's Solicitor of Counsel.

Subpœna. 44 It is ordered by our said court that the said The Musser-Sauntry Land, Logging and Manufacturing Company, and The Chicago, St. Paul, Minneapolis and Omaha Railway Company, the defendants aforesaid, do enter their appearance in this suit, in the clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise the bill filed may be taken as confessed.

And it is further ordered that they show cause by Tuesday, the 6th day of June, 1893, at U. S. court-room, city of Eau Claire, at ten o'clock in the forenoon, why an injunction should not be issued, according to the prayer of the bill on file.

F. M. STEWART, *Clerk.*

Served on the *the* within-named, The Musser-Sauntry Land, Logging and Manfg. Co., by delivering to and leaving with Louis Maffett, agent for said company, personally, a true copy of the within subpœna, May 15, 1893.

And on said day, I served this said subpœna upon the within-named, The Chicago, St. Paul, Minneapolis & Omaha Railway Company, by delivering to and leaving with A. W. Trenholm, superintendent of said company, personally, a copy of the within subpœna.

F. W. OAKLEY,
U. S. Marshal.

Fees.

Services	4 00
Tr. 300 M 6	18 00
Copies	85
	$22 85

Afterward, to wit: on the 29th day of May, 1893, came the defendant, Musser-Sauntry Land, Logging & Manufacturing Company, by S. J. Bradford and Clapp & Macartney, solicitors for said defendant, and filed its notice of appearance as follows:

45 *Notice of Appearance.*

Circuit Court of the United States, Seventh Circuit, Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.
THE MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING Company and The Chicago, St. Paul, Minneapolis and Omaha Railway Company, Respondents.

Notice of appearance. Filed May 29, 1893.

The clerk of the circuit court of the United States for the western district of Wisconsin, seventh circuit, will please enter an appearance for the above-named defendant, Musser-Sauntry Land,

Logging and Manufacturing Company, in the above-entitled action.

S. J. BRADFORD AND
CLAPP & MACARTNEY,
Solicitor for Defendant Musser-Sauntry Land, Logging and Manufacturing Company.

Dated this 25th day of May, A. D. 1893.

Afterwards, to wit: on the 5th day of June, 1893, came the defendant, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, by its solicitor, Thomas Wilson, and filed its notice of appearance.

46 *Notice of Appearance.*

United States Circuit Court, Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
THE MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING Company and The Chicago, St. Paul, Minneapolis and Omaha Railway Company, Defendants.

Notice of appearance. Filed June 6, 1893.

SIR: Please enter my appearance as solicitor for the defendant, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, in the above-entitled suit.

THOMAS WILSON,
Defendant's Solicitor.

To the clerk U. S. circuit court, western dist. of Wisconsin, Madison, Wis.

Afterwards, to wit: on the 6th day of June, 1893, came the defendant, The Musser-Sauntry Land, Logging & Mfg. Co., by its said solicitors and filed its demurrer as follows:

47 *Demurrer.*

Circuit Court of the United State, Seventh Circuit, Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.
THE MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING Company and The Chicago, St. Paul, Minneapolis and Omaha Railway Company, Defendants.

Demurrer. Filed June 6, 1893.

The demurrer of the above-named defendant, Musser-Sauntry Land, Logging and Manufacturing Company, to the bill of complaint of The Northern Pacific Railway Company, complainant herein.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill

to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth:

That the said complain-t hath not, in and by its said bill, made or stated such a case as doth, or ought to, entitled it to any such relief as is thereby sought and prayed for, from or against this defendant.

Wherefore, this defendant demands the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY,
By S. J. BRADFORD AND
CLAPP & MACARTNEY,
Solicitors for Defendant Musser-Sauntry Land, Logging and Manufacturing Company.

CLAPP & MACARTNEY,
Of Counsel for Defendant Musser-Sauntry Land, Logging and Manufacturing Company.

48 STATE OF WISCONSIN, } ss:
County of Ramsey, District of Minnesota, }

Demurrer. Filed June 6, 1893.

William Sauntry, being by me first duly sworn, doth depose and say, that he is the general manager of the above-named defendant, Musser-Sauntry Land, Logging and Manufacturing Company, and makes this affidavit on behalf of said defendant.

And deponent further says, that the above and foregoing demurrer, on behalf of said defendant, to the complainant's bill of complaint in said action, is made in good faith and not for the purpose of delay.

WM. SAUNTRY.

Subscribed and sworn to before me this 5th day of June, A. D. 1893.

[SEAL.] A. E. MACARTNEY,
Notary Public, Ramsey County, Minn.

I, Newel H. Clapp, of counsel, for the above-named defendant, Musser-Sauntry Land, Logging and Manufacturing Company, do hereby certify that in my opinion the above and foregoing demurrer is well founded in point of law.

NEWEL H. CLAPP.

On the same day, to wit: June 6th, 1893, came the defendant, The Chicago, St. Paul, Minneapolis & Omaha R'y Co., by its said solicitor, and filed its demurrer as follows:

49 *Demurrer.*

Circuit Court of the United States for the Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
against
THE MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING Company and The Chicago, St. Paul, Minneapolis and Omaha Railway Company, Defendants.

Demurrer. Filed June 6, 1893.

The demurrer of the above-named defendant, The Chicago, St. Paul, Minneapolis and Omaha Company, to the bill of complaint of the above-named complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true, in the form as the same are therein set forth or alleged, doth demur to said bill, and for cause of demurrer showeth:

That the said complainant hath not in and by its said bill made or stated such a case as doth or ought to entitle it to any such relief as is thereby sued and prayed for from and against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant doth demur thereto, and it prays judgment of this honorable court whether it shall be compelled to make any answer to the said bill of complaint, and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

THOMAS WILSON,
Solicitor and of Counsel for Defendant The Chicago, St. Paul, Minneapolis and Omaha Railway Company, Corner of 4th & Rosebel Sts., St. Paul, Minn.

Demurrer. Filed June 6, 1893. 50

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

THOMAS WILSON,
Of Counsel for Defendant The Chicago, St. Paul, Minneapolis & Omaha Railway Company.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Edwin W. Winter, being duly sworn, deposes and says: I am the general manager of the above named defendant, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, and the foregoing demurrer is not interposed for delay.

E. W. WINTER.

Subscribed and sworn to before me this 5th day of June, A. D. 1893.

[SEAL.] CHAS. P. NASH,
Notary Public, Ramsey County, Minn.

Afterward, to wit: on the 24th day of March, 1894, in the December term, 1893, of said court, in the record of the proceedings thereof, before the Honorable R. Bunn, judge, is the following entry:

Circuit Court of the United States for the Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.
THE MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING Company and The Chicago, St. Paul, Minneapolis and Omaha Railway Company, Defendants.

Order, March 24, 1894. This day the demurrers herein came on to be heard, and were argued by counsel, and same taken under advisement, and it is ordered that Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, the receivers of the Northern Pacific railroad, be made parties complainants herein.

51 Afterwards, to wit: on the 22nd day of May, 1894, in the December term, 1893, of said court in the record of proceedings thereof, before the Honorable R. Bunn, judge, is the following entry.

Circuit Court of the United States for the Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Complainants and Appellants,
vs.
MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING Company and The Chicago, St. Paul, Minneapolis and Omaha Railway Company, Defendants and Appellees.

Order, May 22, 1894. On consideration it is ordered that the demurrers of the defendants to complainants' bill of complaint be and same are hereby sustained.

Afterwards, to wit: on the 29th day of May, 1894, in December term, 1893, of said court in the record of proceedings thereof, before the Honorable R. Bunn, judge, is the following entry:

52 *Final Decree.*

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Complainants & Appellants,

vs.

MUSSER-SAUNTRY LAND, LOGGING & MANUFACTURING COMPANY and The Chicago, St. Paul, Minneapolis and Omaha Railroad Company, Defendants and Appellants.

Final decree, May 29, 1894.

It is ordered, adjudged and decreed that complainants' said bill of complaint be and the same is hereby dismissed for want of equity with costs in favor of the defendants, to be taxed and entered as part of decree, and which are taxed at forty dollars.

By the court:

R. BUNN.

On same day, to wit: on the 17th day of September, 1894, said complainants, by said solicitor, filed petition for allowance of appeal as follows:

Petition for Appeal.

United States Circuit Court for the Western District of Wisconsin

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Complainants and Appellants,

vs.

MUSSER-SAUNTRY LAND, LOGGING & MANUFACTURING COMPANY and The Chicago, St. Paul, Minneapolis & Omaha Railway Company, Defendants and Appellees.

Petition for and allowance of appeal.

Petition for appeal. Filed Sept. 17, 1894.

The above-named complainants, Northern Pacific Railroad Company, and Thomas F. Oakes, Henry C. Payne and Henry C. Rouse receivers of the Northern Pacific Railroad Company, conceiving themselves

Petition for appeal. Filed Sept. 17, 1894. 53

aggrieved by the final decree entered in the above-entitled cause, on May 29th, A. D. 1894, at the December term of said court, have duly filed in said court, their assignments of error, and do now hereby appeal from said final decree to the United States circuit court of appeals for the seventh circuit, and pray that this, their said appeal may be allowed; that the transcript of record, proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the seventh circuit; and that the proper orders touching the securities required of them may be made.

F. M. DUDLEY,
Solicitor for Complainants,
New York Life Insurance Building, St. Paul, Minn.

Now, to wit: September 17, A. D. 1894, it is ordered that the appeal be allowed as prayed for.

R. BUNN, *Judge.*

Afterwards, to wit: on the 17th day of September, 1894, came the complainant-, Northern Pacific Railroad Company, and Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, receiver- of the Northern Pacific Railroad Company, by F. M. Dudley, solicitor for said complainants, and filed assignment of errors as follows:

54 *Assignment of Errors.*

United States Circuit Court for the Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY and THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Complainants,

vs.

MUSSER-SAUNTRY LAND, LOGGING & MANUFACTURING COMPANY and The Chicago, St. Paul, Minneapolis & Omaha Railway Company, Defendants.

Assignment of errors.

Assignment of errors. Filed Sept. 17, 1894.

Now come the above-named complainants, Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, by their solicitor, and say that in the records and proceedings in the above-entitled cause in said United States circuit court for the western district of Wisconsin, there is manifest error, as follows, to wit:

I.

That the said court failed and refused to hold and decree that the lands described in the bill of complaint herein are the lands of, and belong to, said Northern Pacific Railroad Company, and that said railroad company has thereto the full title.

II.

The said court failed and refused to hold and decree that the patents issued by the State of Wisconsin to said defendant, Chicago, St. Paul, Minneapolis & Omaha Railway Company for said lands, were issued without authority of law,

Assignment of errors. Filed Sept. 17, 1894. 55

and were and are void and a cloud upon the title of said Northern Pacific Railroad Company and to said lands. And said court further failed and refused to hold that the said defendant railway company took no interest, right, title or claim whatsoever in or to said lands; and that the said pretended conveyances of said lands and each of them, by said railway company,

and the said pretended mortgages to said railway company upon said lands, and the said pretended conveyance of said lands to said defendant, Musser-Sauntry Land, Logging & Manufacturing Company, and each and all of said instruments purporting to convey or affect the title of, or any interest in or to, said described lands, were and are, as far as they purport to affect the title of, or any interest in or to said described lands, null and void and a cloud upon the title of said Northern Pacific Railroad Company in and to said lands.

III.

The said court failed and refused to hold and decree that the cash entries of said lands by said defendant, Musser-Sauntry Land, Logging & Manufacturing Company, as in said bill of complaint set forth, and allowed by the register and receiver of the United States district land office at Ashland, Wisconsin, as in said bill of complaint set forth, were made and allowed without authority of law, and were and are void and a cloud upon the title of said Northern Pacific Railroad Company in and to said lands.

IV.

The said court failed and refused to issue a writ of injunction, enjoining and restraining the said defendants from attempting to consummate said cash entries or purchase said lands from the United States; or from taking, accepting or receiving, or authorizing others to take, accept or receive, any patent for said lands described in said bill of complaint, from the United States. And the said court further failed and refused to issue a writ of injunction, commanding said defendant, Musser-Sauntry Land, Logging & Manufacturing Company, to refuse to accept or receive any patents for said lands, or any of them, or requiring it to execute a relinquishment of said lands and file said relinquishment, together with instructions to cancel said patents, with the Commissioner of the General Land Office, if such patents should be issued or tendered.

V.

Assignment of errors. 56
Filed Sept. 17, 1894.

The said court failed and refused to issue a writ of injunction, enjoining and restraining said defendants, or either of them, their agents, workmen, servants and employés, from entering upon, or authorizing others to enter upon, said lands described in the bill of complaint, and cutting, felling, or removing the timber thereon; or any of it; or from selling or disposing of any part thereof, or manufacturing it, or any of it, into saw-logs or lumber, or other merchantable commodity and selling and disposing of the same.

VI.

The said court held and decreed that there was no equity in said complainants' bill of complaint filed herein.

VII.

The entry of an order by said court sustaining the defendants' demurrer to the bill of complaint herein.

VIII.

The entry of a final decree in said action, dismissing complainants' bill of complaint, and awarding judgment to said defendants for costs.

Wherefore, the said Northern Pacific Railroad Company and the said Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, pray that the decree of the said United States circuit court for the western district of Wisconsin, in the said cause heretofore entered, to wit, on the 29th day of May, 1894, dismissing complainants' said bill of complaint, be reversed; and that said court be directed to enter an order overruling said demurrer and awarding and decreeing to said complainants the relief prayed for in their said bill of complaint, and such other and further relief as upon all the facts it appears that said complainants are in equity and good conscience entitled to.

F. M. DUDLEY,
Solicitor for Complainants.

On same day, to wit: on the 17th day of September, 1894, said complainants, by *its* solicitor, filed bond on appeal as follows:

57 *Bond on Appeal.*

United States Circuit Court for the Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY and THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers for the Northern Pacific Railroad Company, Complainants and Appellants,

vs.

MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING Company and The Chicago, St. Paul, Minneapolis & Omaha Railway Company, Defendants and Appellees.

Bond.

Bond on appeal and approval. Filed Sept. 17, '94.

Know all men by these presents, that said Northern Pacific Railroad Company, a corporation organized and existing under and by virtue of an act of the Congress of the United States, approved July 2, 1864, as principal, and the America-Surety Company of New York, as surety, are held and firmly bound unto the above-named, Musser-Sauntry Land, Logging & Manufacturing Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company, in the sum of five hundred dollars ($500.00) lawful money of the United States, to be paid to said

Musser-Sauntry Land, Logging & Manufacturing Company and said Chicago, St. Paul, Minneapolis & Omaha Railway Company, their successors or assigns, to which payment well and truly to be made, we bind ourselves and our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 13th day of September, A. D. 1894.

Whereas, the above-named complainants, Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, are about to prosecute an appeal to the United States circuit court of appeals for the seventh circuit, to reverse a final decree rendered in the above-entitled cause, by the judge of the United States circuit court for the western district of Wisconsin:

Bond on appeal and approval. Filed Sept. 17, '94. 58

Now, therefore, the condition of the above obligation is such, that if said Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, shall prosecute said appeal to effect, and answer all costs if they fail to make said appeal good, then this obligation shall be void, else to remain in full force and effect.

NORTHERN PACIFIC RAILROAD COMPANY,
By F. M. DUDLEY.

In presence of—
M. T. SANDERS.

AMERICAN SURETY COMPANY OF NEW YORK,
By DANIEL D. MERRILL,
Resident Vice-P't.
GEORGE B. EDGERTON,
Res't Ass't Secretary.

In presence of—
T. H. PRIDHAM.
HUGH CHILD.

Approved this 17 day of September, A. D. 1894.
R. BUNN, *Judge.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Notary's certificate. Be it remembered, that on the 13th day of September, A. D. 1894, before me personally appeared Daniel D. Merrill and George B. Edgerton, to me personally known, who, being by me severally sworn, say: The said Daniel D. Merrill says: that he is the resident vice-president of the American Surety Company of New York, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation,

Notary's certificate. 59

and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors.

And the said George B. Edgerton says: that he is the resident assistant secretary of said company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors.

And the said Daniel D. Merrill and the said George B. Edgerton each acknowledge the said instrument to be the free act and deed of said corporation.

S. L. NOPPAUGH,
Notary Public, Ramsey County, Minnesota.

On same day, to wit: on the 17th day of September, in the June special term, A. D. 1894, of said court, in the record of proceedings thereof, is the following entry:

United States Circuit Court for the Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Complainants and Appellants,

vs.

MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING Company and The Chicago, St. Paul, Minneapolis & Omaha Railway Company, Defendants and Appellees.

Order Allowing Appeal.

It is ordered that the appeal be allowed as prayed for.

And on same day, to wit: September 17th, A. D. 1894, citation on appeal issued:

60 *Citation.*

UNITED STATES OF AMERICA:

To the Musser-Sauntry Land, Logging and Manufacturing Company and the Chicago, St. Paul, Minneapolis and Omaha Railway Company:

Citation. Whereas, the Northern Pacific Railroad Company, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, have lately appealed to the United States circuit court of appeals for the seventh circuit from the decree, lately rendered in the circuit court of the United States for the western district of Wisconsin, made in favor of you, the said The Musser-Sauntry Land, Logging

and Manufacturing Company and The Chicago, St. Paul, Minneapolis and Omaha Railway Company, and has filed the security required by law: You are therefore hereby cited to be and appear before the said United States circuit court of appeals for the seventh circuit, at the city of Chicago, on the 17th day of October A. D. 1894, to do and receive what may appertain to justice to be done in the premises.

Witness the Honorable R. Bunn, judge of the district court of the United States for the western district of Wisconsin, the 17th day of September, A. D. 1894, and of the Independence of the United States the one hundred and nineteenth.

R. BUNN, *Judge.*

We hereby accept due service of the above citation this 26 day of Sept., 1894.

THOMAS WILSON,
Att'y for Defendants.

U. S. circuit court, western district of Wisconsin. The Northern Pacific Railroad Company *vs.* The Musser-Sauntry Land, Logging & Mfg. Co. and The Chicago, St. Paul, Minneapolis & Omaha R'y Co. Citation.

61 *Certificate of Clerk.*

WESTERN DISTRICT OF WISCONSIN, *ss:*

Clerk's certificate. I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record and proceedings in court now remaining of record and on file in my office in the above-entitled cause, and that it is a correct transcript therefrom, and also a true copy of assignment of errors, petition for and order allowing appeal and also a true copy of bond on appeal and the original citation and service thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office in the city of Madison, this 12 day of October, A. D. 1894, and of our Independence the one hundred and nineteenth.

[SEAL.] F. M. STEWART, *Clerk.*

62 WEDNESDAY, *December* 19, 1894.

Before Hon. William A. Woods, circuit judge.

NORTHERN PACIFIC RAILROAD COMPANY *et al.*, Appellants,
v.
MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY *et al.* } 208.

It is ordered by the court that the time allowed by the rules in which appellant may file brief in this cause be, and the same is hereby, extended until December 30, 1894.

MONDAY, *January* 7, 1895.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John H. Baker, district judge.

63 NORTHERN PACIFIC RAILROAD COMPANY *et al.*, Appellants,
v.
MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY *et al.*, Appellees. } 208.

It is ordered by the court that this cause be, and the same is hereby, set down for hearing January 10, 1895.

THURSDAY, *January* 10, 1895.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John H. Baker, district judge.

NORTHERN PACIFIC RAILROAD COMPANY *et al.*, Appellants,
v.
MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY *et al.*, Appellees. } 208.

It is ordered by the court that this cause be, and the same is hereby, reset down for hearing for January 26, 1895.

64 SATURDAY, *January* 26, 1895.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John H. Baker, district judge.

NORTHERN PACIFIC RAILROAD COMPANY *et al.*, Appellants,
v.
MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY *et al.*, Appellees. } 208.

Now this day came the parties, by their counsel, and the cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. James McNaught and Mr. F. M. Dudley, counsel for appellant, and by Mr. Thomas Wilson, counsel for appellees, and the court, having heard the same, takes this matter under advisement.

65 United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1894.

THE NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. OAKES, HENRY C. PAYNE, AND HENRY C. ROUSE, RECEIVERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, Appellants,

vs.

THE MUSSER-SAUNTRY LAND, LOGGING & MANUFACTURING COMPANY AND CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Appellees.

No. 208. Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

Heard by Woods and Jenkins, circuit judges, and Baker, district judge.

The appellants, complainants below, claim title to the lands in controversy under the third section of an act of Congress approved July 2, 1864, which so far as it bears upon the questions involved is as follows: "Sec. 3. And be it further enacted, That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile,

66 on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, that the railroad company receiving the previous land grant may assign their interest to said Northern Pacific Railroad Company, or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: 13 Stats. 365."

The Northern Pacific Railroad Company, hereafter called the Pacific Company, accepted this grant on December 29, 1864. On July 30, 1870, it fixed the general route of its road, extending through Wisconsin, within twenty miles of the lands in controversy. Thereafter it proceeded with the survey and location of its line and on July 6, 1882, definitely fixed that portion of its line extending opposite these lands by filing a plat thereof in the office of the Commissioner of the General Land Office. The lands in controversy are within the limits of the grant as defined by the plat of definite location filed July 6, 1882. By September, 1882, the Pacific Company had completed the line of its road coterminous with these lands, and such line having been examined by commissioners appointed for that purpose by the President, was reported by them to have been completed in a good, substantial and workmanlike manner, as required by the act of Congress; and thereafter, on September 16, 1882, the President approved said report and ordered that patents for the lands earned by the construction of the road should be issued to the co[illegible]pany. These facts show that the legal title to these lands is [illegible]ed in the Pacific Company, if not within the exceptions [illegible]umerated in the granting act.

67 Whether these lands are w[illegible]in any of these exceptions depends upon the following facts: By an act entitled "An act granting lands to the State of Wisconsin to aid in the construction of railroads in said State," approved June 3, 1856, 11 Stat. 20, Congress granted to that State, for the purpose of aiding in the construction of a railroad from Madison or Columbus by way of Portage city to St. Croix river or lake between townships twenty-five and thirty-one, and thence to the west end of Lake Superior and to Bayfield, every alternate section of land designated by odd numbers, for six sections in width, on each side of said road. The act further provided, that in case it should appear that the United States had, when the line of said road was definitely located, sold any sections or parts thereof, granted as aforesaid, or that the right of pre-emption had attached to the same, then it should be lawful for any agent or agents to be appointed by the governor of the State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections or parts of sections, above specified, so much lands, in alternate sections, or parts of sections as should be equal to such lands as the United States had sold, or otherwise appropriated, or to which the right of pre-emption had attached: Provided, that the lands so located should in no case be further than fifteen miles from the road, and selected for and on account of such road.

The State accepted this grant, and bestowed that portion of it which pertained to the line from the St. Croix river or lake to the west end of Lake Superior and to Bayfield upon the St. Croix and Lake Superior Railroad Company. On September 20, 1858, this company definitely located the line of its road between these points. The lands in controversy did not fall within either the place or indemnity limits as established under this grant.

By an act approved May 5, 1864, 13 Stats. 66, entitled "An act

granting lands to aid in the construction of certain railroads in the State of Wisconsin" it is provided:

"SEC. 1. That there be and is hereby granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said State, to Bayfield, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose, by the act of Congress of June three, eighteen hundred and fifty-six, upon the same terms
68 and conditions as are contained in the act granting lands to the State of Wisconsin, to aid in the construction of railroads in said State, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of, any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, than it shall be lawful for any agent or agents, to be appointed by said company, to select, subject to the approval of the Secretary of the Interior from the public lands of the United States nearest to the tier of sections above specified, as much land in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption or homestead right has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said State for the use and purpose aforesaid: Provided, that the lands to be so located shall in no case be further than twenty miles from the line of the said roads, nor shall such selection or location be made in lieu of lands received under the said grant of June three, eighteen hundred and fifty-six, but such selection and location may be made for the benefit of said State, and for the purpose aforesaid, to supply any deficiency under the said grant of June third, eighteen hundred and fifty-six, should any such deficiency exist."

The State accepted this act, March 20, 1865, and on the same day conferred all the lands, rights and privileges granted by the above section, upon the St. Croix and Lake Superior Railroad Company. That company accepted the grant, April 22, 1865, and by a resolution of its executive committee adopted the line as already located under the act of June 3, 1856, as the line of the road under the act of May 5, 1864. On May 5, 1865, copies of these resolutions, and of the act of the legislature of Wisconsin conferring this grant upon the St. Croix and Lake Superior Railroad Company were filed with the Secretary of the Interior. On February 28, 1866, the Commissioner of the General Land Office directed the register and receiver of the district land office to withhold the odd-numbered sections within ten and twenty miles of said line, so fixed, from sale or loca-

tion, pre-emption settlement or homestead entry. This order was received and filed in the district land office on March 17, 1866.

The lands in controversy lie within the twenty-mile limits of this withdrawal, but are more than fifteen miles from the line as
69 fixed. The St. Croix and Lake Superior Railroad Company having failed to construct said railroad, the grant to it was declared forfeited to the State. In February, 1882, the appellee, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, hereinafter called the Omaha Company, succeeded, under the legislation of the State, to the rights of the St. Croix and Lake Superior Railroad Company; and during that year it completed the road past these lands and to the west end of Lake Superior. On May 12, 1883, and June 14, 1883, one W. H. Phipps, as agent for the Omaha Company filed lists for selection of indemnity lands claimed as inuring to said company under said grant, including, among others, the lands in controversy. These selections were allowed by the officers of the district land office, but were never approved by the Commissioner of the General Land Office, nor by the Secretary of the Interior. The governor of the State caused patents for the lands in controversy, with other lands, to be issued to the Omaha Company. In 1885 and 1886 the Omaha Company executed deeds for these lands to the grantors of the Musser-Sauntry Land, Logging & Manufacturing Company, which company acquired whatever interest in these lands was conveyed to the Omaha Company by the State. The Secretary of the Interior having completed the adjustment of the grants made by the acts of 1856 and 1864 it was ascertained in 1889 that these grants were satisfied without the lands in controversy; and on November 25, 1889, the Omaha Company relinquished these lands, with others, and requested that the attempted selection should be cancelled, which cancellation was made in February, 1890. In November, 1889, the Musser-Sauntry Company having ascertained that these lands would not inure to the railroad company under the grant, applied to purchase the same under the provisions of an act of Congress approved March 3, 1887. The register and receiver of the district land office, disregarding the Pacific Company's protest, allowed the application, and accepted the cash tendered for the land. In February, 1890, the Secretary of the Interior, in a ruling made in the course of the adjustment of the Omaha Company's grant, held that the indemnity lands under the act of May 5, 1864, reserved by order of the Commissioner of the General Land Office, of February 28, 1866, were, by reason of such reservation, excepted from the operation of the grant to the Pacific Company in the act of July 2, 1864. On December 19, 1890, this ruling was reaffirmed and is still in force. On March 5, 1891, in accordance with the rulings of the Secretary of the Interior, the Musser-Sauntry Company made a new application to purchase the lands in controversy, which was allowed; and on May 5,
70 1891, the Musser-Sauntry Company was allowed to and did make a cash entry of these lands. The Pacific Company appealed from this allowance, but on October 3, 1892, the Commissioner of the General Land Office affirmed it, holding that these

lands were excepted from the operation of the grant to the Pacific Company by the withdrawal order of 1866.

To the complainants' bill setting out these facts and praying that their title to these lands might be quieted, and that the defendants be enjoined from receiving or accepting patents therefor from the United States, and from cutting and removing the timber therefrom, the defendants interposed a demurrer on the ground that the bill did not state a case entitling the complainants to any equitable relief. The demurrer was sustained and the complainants, electing to stand upon their bill, a decree was entered dismissing the same for want of equity. From this decree the present appeal is prosecuted.

After making the foregoing statement, the opinion of the court was delivered by BAKER, district judge:

The lands in controversy are within the place limits of the Pacific Company's road. The title, therefore, passed to that company, if the lands were subject to the operation of the grant made by the third section of the act of July 2, 1864. The contention is that these lands were not subject to the operation of this grant, for the reason that they were withdrawn by the Land Department in February, 1866, in order to satisfy the grant of indemnity lands made by the earlier acts of June 3, 1856, and May 5, 1864. These lands are within the indemnity and not within the place limits of the grant to the Omaha Company. The grant to the Pacific Company is of "every alternate section of public lands, * * * to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof."

The rule that a grant by Congress does not operate upon lands theretofore lawfully reserved for any purpose whatever has
71 too often been declared to be longer open to discussion. As was observed by the Supreme Court in the case of The Wisconsin Central Railroad Company *vs.* Forsythe, decided June 3, 1895, and not yet reported: "There can be no doubt as to this rule, or as to the fact that lands withdrawn from sale by the Land Department are considered as reserved within its terms."

The lands in controversy within the indemnity limits of the Omaha Company's road were not granted by the acts of 1856 or 1864. They were simply withdrawn from sale, pre-emption or homestead entry by the action of the Land Department in order that

the beneficiary of the grant might, in case the full amount of lands granted was not found within the place limits, select therefrom enough to supply the deficiency. These lands being within the indemnity limits of the Omaha Company, might be required to satisfy the earlier grant; but not being granted, they were still within the disposing power of Congress. It has often been held that "until selection was made the title remained in the Government, subject to its disposal at its pleasure." Kansas Pacific Railroad Co. *vs.* Atchison, Topeka & Santa Fe Railroad Co., 112 U. S. 414, 421; United States *vs.* McLaughlin, 127 U. S. 428, 450, 455; Wisconsin Railroad Co. *vs.* Price County, 133 U. S. 496, 511; United States *vs.* Missouri, Kansas & Texas Railway Co., 141 U. S. 358, 374.

It follows that notwithstanding the grant in the acts of 1856 and 1864 to the Omaha Company, the title to the indemnity lands which might be required to supply the deficiency in its place limits remained in the Government and was subject to its disposal at its pleasure. The Congress might, without any violation of the rights of the Omaha Company, have granted to the Pacific Company all the lands within the indemnity limits of the former company, if it had chosen to do so. It is insisted that as such grant might have been made, the act of July 2, 1864, ought to be so construed as to deny to the Land Department the power to withdraw any lands which, upon the definite location of the line of the Pacific Company, might be found to be within its place limits, although such withdrawal was made in order to satisfy the claims of an earlier grant to indemnity lands. The grant in the act of July 2, 1864, is a grant *in præsenti*. Its language is "that there be, and is hereby granted." The construction and effect of such words of grant have often been considered by the Supreme Court. In the case of The St. Paul and Pacific Railroad Company *vs.* The Northern Pacific Railroad Company, 139 U. S. 1, 5, Mr. Justice Field speaking for the court, said: "The language of the statute is, 'that there be, and hereby is granted' to the company every alternate section of the
72 lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future. The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in præsenti*; that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route. This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as not to be open to discussion. Schulenberg *vs.* Harriman, 21 Wall., 44, 60; Leavenworth, Lawrence, etc., Railroad Co. *vs.* United States, 92 U. S., 733; Missouri, Kansas,

etc., Railway Co. *vs.* Kansas Pacific Railway Co., 97 U. S., 491; Railroad Co. *vs.* Baldwin, 103 U. S., 426."

The foregoing statement of the law was quoted and approved in the recent case of The United States *vs.* Southern Pacific Railroad Company, 146 U. S., 570, 593.

The lands in controversy were reserved at the time of the definite location of the line of the Pacific Company by an order of the Land Department made after the passage of the act of July 2, 1864. These lands, having been reserved, were excepted out of the grant, as much as if in a deed they had been excluded from the conveyance by metes and bounds, provided the reservation was one which the Land Department had the power to make. The true question for decision is, Did the Land Department have lawful authority to reserve, after the passage of the act of July 2, 1864, lands which on the definite location of the road were found to be within the place limits of the Pacific Company, in order to satisfy the claims of an earlier grant to indemnity lands? The act of July 2, 1864, contains no limitation in this regard on the power of the Land Department. By excepting out of the grant all lands reserved for any public use, it impliedly recognizes the power of the Land Department to make such reservations. There is no language in the act which denies or limits the authority of the Land Department to make reservations for public purposes at any time before the definite location of the line shall have been fixed. What lands ought to be reserved in order to satisfy the various acts of Congress, must, in the nature of things, be left largely to the discretion of this department. It is said
73 that it would lead to monstrous injustice if the Land Department were clothed with such power. We see no force in this suggestion. No injustice will be done to the Pacific Company by holding that the Land Department has authority to reserve enough of the public domain to satisfy all earlier grants. In our judgment that department is invested with such authority.

A reference to some of the cases will, we think, make this apparent. The case of Walcott *vs.* Des Moines Co., 5 Wall., 681, is a leading case, and one of the earliest in which the effect of a reservation by the Land Department was considered. On August 8, 1846, Congress granted to the then Territory, now State, of Iowa for the purpose of aiding it to improve the navigation of the Des Moines river from its mouth to the Raccoon fork, one equal moiety, in alternate sections, of the public lands, in a strip five miles in width on each side of said river. In 1856 Congress made a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads, by which act it was provided, "that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object whatsoever, be and the same are hereby reserved to the United States from the operation of this act." It was decided in the case of Dubuque and Pacific R. R. Co. *vs.* Litchfield, 23 How., 66, that the grant of August 8, 1846, did not extend above the mouth of the Raccoon fork. Lands above the mouth of that fork had been reserved for the improvement of the navigation

of the Des Moines river, first by the Secretary of the Treasury, and afterwards, by the Secretary of the Interior. The lands, the title to which was in controversy, were situated above the mouth of the Raccoon fork, and were within the place limits of the grant in aid of the railroads. It was contended that these lands had not been reserved by competent authority; that they were not within the limits of the grant of August 8, 1846; and, therefore that the railroad took the title to them under the latter grant. This contention was denied, the court observing: "It has been argued that these lands had not been reserved by competent authority and hence that the reservation was nugatory. As we have seen they were reserved from sale for the specific purpose of aiding in the improvement of the Des Moines river first by the Secretary of the Treasury when the Land Department was under his supervision and control and again by the Secretary of the Interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the President and Cabinet. Besides, if this power was not competent, which
74 we think it was ever since the establishment of the Land Department, and which has been exercised down to the present time, the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty of the Land Office to reserve from sale the lands embraced in the grant. Otherwise, its object might be utterly defeated."

So, the acts of 1856 and 1864, by necessary implication, carried not only the power, but the duty, of the Land Department, to reserve for the benefit of the Omaha Company the lands necessary to satisfy the grant made to it.

In the case of Kansas Pacific R'y Co. *vs.* Dunmeyer, 113 U. S. 629, it was held that, where a homestead right had attached to a tract, after the grant and before the time of definite location of a railroad company's line, which homestead was afterwards abandoned, the tract was simply restored to the public domain, and did not pass to the railroad company under its grant; that the grant only attached to lands which were the subject of grant at the time of definite location; and that the company had no interest in the question as to what afterwards became of a tract which was not public land at the time the grant became fixed. On page 644, Mr. Justice Miller in delivering the opinion of the court, observed: "The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds." This doctrine was affirmed in Hastings and Dakota Railroad Co. *vs.* Whitney, 132 U. S. 357; Sioux City, etc. Land Co. *vs.* Griffey, 143 U. S. 32; Bardon *vs.* Northern Pacific Railroad Co., 145 U. S. 535.

The supreme court has decided in many cases that the withdrawal by the Land Department operated to exclude from sale purchase or pre-emption, all lands embraced in such withdrawal or reservation; and that it also operated to exclude from the grant to a railroad company all lands so withdrawn or reserved, for any public purpose or use, at the time of the definite location of its line.

Bullard *vs.* Des Moines Railroad Co., 122 U. S. 167; United States *vs.* Des Moines Navigation & Railway Co. 142 U. S. 510.

In the case last cited it is said: "The validity of this reservation was sustained in the case of Walcott *vs.* Des Moines Company, 5 Wall. 681. In that case it was held, that, even in the absence of a command to that effect in the statute, it was the duty of the officers of the Land Department immediately upon a grant being made by Congress to reserve from settlement and sale lands within
75 the grant; and that if there was dispute as to its extent, it was the duty to reserve all lands which, upon either construction, might become necessary to make good the purposes of the grant. This ruling as to the power and duty of the officers of the Land Department has been followed in many cases."

In the case of Hamblin *vs.* Western Land Company, 147 U. S. 531, 536, it is said: "A reservation by the Interior Department, it is well settled, operates to withdraw the land from entry under the pre-emption or homestead laws;" citing Wolcott *vs.* Des Moines Company, 5 Wall. 681; Wolsey *vs.* Chapman, 101 U. S. 755; Bullard *vs.* Des Moines & Ft. Dodge Railroad Co., 122 U. S. 167; United States *vs.* Des Moines, etc. Co., 142 U. S. 510.

These cases and others to the same effect establish the principle that the Land Department is invested with authority to withdraw or reserve public lands from sale, entry or grant, for the purpose of devoting them to some public purpose or use in pursuance of an act of Congress; and that the withdrawal of such lands at any time before the title to the lands attach, under a grant, by the definite location of a railroad line, excludes them from the mass of public lands upon which a legislative grant will operate. The reason is obvious. Otherwise a later grant might operate to defeat or impair the effect of a prior grant. Whenever Congress makes a grant of public land in aid of a public improvement, it is not be supposed that it was within the legislative intent to defeat or impair the full effect of the prior grant, unless such purpose is manifested in plain and unambiguous terms. When public lands have been segregated from the common mass by an act of Congress, or by an order of the Land Department withdrawing them from entry or sale for the accomplishment of some specific public purpose, it has never been held that such lands were embraced within the operation of a grant in aid of the construction of a railroad, should the order of withdrawal afterwards from any cause be revoked. Lands so reserved or withdrawn at the time of the definite location of a railroad line are not embraced within the terms of the grant. The grant though made prior to the reservation does not attach to lands withdrawn to satisfy an earlier grant, for the reason that they are excluded therefrom by the clear and explicit language of the act of Congress.

It is argued that the fundamental error in the decision of the court below is in overlooking the fact that the earlier grant to the Omaha Company passed no title to, and made no grant of, the indemnity lands. It is true that no title to the indemnity lands could vest in the Omaha Company until such lands were located and selected, and such location and selection had been approved by the

Land Department. But the earlier grant, while conveying no
76 title to the indemnity lands, operated as a covenant or promise by the Government to convey those lands, which bound it in good faith to do no act which would defeat or impair such covenant or promise. So far as the Pacific Company is concerned, it has no just ground of complaint, for in reserving these lands for the benefit of the earlier grant, the Land Department has simply done what the plighted faith of the Government required it to do. While the right to these indemnity lands rested in covenant or contract, it imposed on the Government a strong moral obligation to cause such acts to be done as would protect the just expectations of the Omaha Company from disappointment. And although the grant to the Pacific Company was one operating *in præsenti*, still its title did not, and by the express terms of the statute, could not, attach to any specific lands until the line of its definite location was fixed, and then only to public lands, not reserved, or otherwise appropriated. The lands in controversy at the time of the definite location of its line were reserved by competent authority for the benefit of an earlier grant, and, hence, were not embraced within the operation of the grant to the Pacific Company.

We have carefully examined all the authorities cited by counsel for the appellants, and find nothing in conflict with the views here expressed. The conclusion reached makes it unnecessary to consider the other questions presented. There is no error in the decree, and it will be affirmed at the cost of the appellants.

77 TUESDAY, *July* 9, 1895.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John H. Baker, district judge.

THE NORTHERN PACIFIC RAILROAD COMPANY, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, Receivers of the Northern Pacific Railroad Company, Appellants,

vs.

THE MUSSER-SAUNTRY LAND, LOGGING & Manufacturing Company and Chicago, St. Paul, Minneapolis and Omaha Railway Company, Appellees.

208. Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Wisconsin and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

78 Afterwards, to wit, on the 17th day of January, 1896, came the appellants, Northern Pacific Railroad Company and

Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of the Northern Pacific Railroad Company, by F. M. Dudley, solicitor for said appellants, and filed their petition for allowance of appeal as follows:

United States Circuit Court of Appeals for the Seventh Circuit.

NORTHERN PACIFIC RAILROAD COMPANY and THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Appellants,

v.

MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING Company and Chicago, St. Paul, Minneapolis and Omaha Railway Company, Appellees.

The above-named appellants, conceiving themselves aggrieved by the order entered on the ninth day of July, A. D. 1895,
79 in the above-entitled proceeding, and having filed an assignment of the errors complained of, do hereby appeal from said order to the Supreme Court of the United States, and pray that this their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

F. M. DUDLEY,
Solicitor for Appellants.

And now, to wit, January 17th, A. D. 1896, it is ordered that the appeal be allowed as prayed for.

JAMES G. JENKINS,
Circuit Judge, Sitting in Court of Appeals.

On the same day, to wit, on the 17th day of January, 1896, came the appellants, Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of the Northern Pacific Railroad Company, by F. M. Dudley, solicitor for said complainants, and filed assignment of errors as follows:

80 United States Circuit Court of Appeals for the Seventh Circuit.

NORTHERN PACIFIC RAILROAD COMPANY and THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Appellants,

v.

MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING Company and Chicago, St. Paul, Minneapolis & Omaha Railway Company, Appellees.

Assignment of Errors.

Come now the above-named appellants and say that in the records and proceedings in the above-entitled case in the said United

States circuit court of appeals for the seventh circuit there is manifest error, as follows, to wit:

First. The said court failed to hold that the Northern Pacific Railroad Company has a prior, and therefore a better, right to the lands in controversy.

81 Second. That said court held that the lands in controversy were reserved and excepted from the grant to said Northern Pacific Railroad Company by the order of withdrawal made February 28, 1866.

Third. The said court refused to find that the lands described in the bill of complaint are the lands of and belonging to said Northern Pacific Railroad Company, and that said company has thereto the full title.

Fourth. The said court refused to find that the patents issued by the State of Wisconsin to said defendant, Chicago, St. Paul, Minneapolis & Omaha Railway Company, for said lands were issued without authority of law and were and are void and a cloud upon the title of said Northern Pacific Railroad Company in and to said lands, and that the pretended conveyance of said lands and each and all thereof by said railway company and the said pretended mortgages to said railway company upon said lands and the

82 said pretended conveyance of said lands to said defendant, Musser-Sauntry Land, Logging and Manufacturing Company, and each and all of said instruments purporting to convey or affect the title of or any interest in or to any of said described lands were and are, so far as they purport to affect the title of or any interest in or to said described lands, null and void and a cloud upon the title to said Northern Pacific Railroad Company in and to said lands.

Fifth. The said court failed to find that the cash entries of said lands by said defendant, Musser-Sauntry Land, Logging and Manufacturing Company, allowed by the regester and receiver of the United States district land office at Ashland, Wisconsin, as in said bill of complaint set forth, were made and allowed without authority of law and were and are void.

Sixth. The said court failed to direct the issuance of a writ of injunction enjoining and restraining the said defendant, Musser-Sauntry Land, Logging & Manufacturing Company, from

83 attempting to consum-ate said cash entries or purchase said lands from the United States and from taking, accepting, or receiving, or authorizing others to take, accept, or receive any patent for said lands described in said bill of complaint from the United States; and the said court further failed to direct the issuance of a writ of injunction commanding said defendant, Musser-Sauntry Land, Logging and Manufacturing Company, to refuse to accept or receive any patents for said lands or any thereof, and requiring it to execute a relinquishment of said lands and file said relinquishment, together with instructions to cancel said patents, if such patents were issued or tendered, with the Commissioner of the General Land Office.

Seventh. The said court failed to direct the issuance of a writ of

injunction enjoining and restraining said defendants and eac
them, their agents, workmen, servants, and employés, from ente
upon or authorizing others to enter upon said lands descr
84 in the bill of complaint, and cutting, felling, or removing
timber thereon or any of it, and from selling or disposin
any part thereof or manufacturing it or any of it into saw log
lumber or other merchantable commodity and selling or dispos
of the same.

Eighth. The said court affirmed the decree of the United St
circuit court for the western district of Wisconsin dismissing c
plainants' bill of complaint herein.

F. M. DUDLEY,
Solicitor for Complainant

On the same day, to wit, on the 17th day of January, 1896,
appellants, by their solicitor, filed bond on appeal as follows:

85 United States Circuit Court of Appeals for the Seventh
Circuit.

NORTHERN PACIFIC RAILROAD COMPANY and THOMAS F. OAKE
Henry C. Payne, and Henry C. Rouse, as Receivers of th
Northern Pacific Railroad Company, Appellants,

v.

MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING CO
pany and Chicago, St. Paul, Minneapolis and Omaha Railwa
Company, Appellees.

Bond.

Know all men by these presents that said Northern Pacific R
road Company, a corporation organized and existing under and
virtue of an act of the Congress of the United States approved J
2, 1864, as principal, and the National Surety Company, a corpo
tion existing under the laws of the State of Missouri, as surety,
held and firmly bound unto the above-named appell
86 Musser-Sauntry Land, Logging and Manufacturing Compa
and The Chicago, St. Paul, Minneapolis and Omaha Railw
Company, in the sum of one thousand dollars ($1,000), lawful mo
of the United States, to be paid to said Musser-Sauntry Land, L
ging and Manufacturing Company and said Chicago, St. Pa
Minneapolis and Omaha Railway Company, their successors a
assigns; to which payment, well and truly to be made, the s
obligers hereby bind themselves and their successors and assig
jointly and severally, by these presents.

Sealed and dated this 15th day of January, A. D. 1896.

87 Whereas the above-named appellants, Northern Paci
Railroad Company and Thomas F. Oakes, Henry C. Pay
and Henry C. Rouse, as receivers of the Northern Pacific Railro
Company, are about to prosecute an appeal to the United Sta
Supreme Court to reverse a final decree rendered in the abo
entitled cause by the said United States circuit court of appeals
the seventh district.

Now, therefore, the condition of the above obligation is such that if said Northern Pacific Railroad Company and said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of said Northern Pacific Railroad Company, shall prosecute said appeal to effect and answer all costs if they fail to make said appeal good, then this obligation shall be void; else to remain in full force and effect.

NORTHERN PACIFIC RAILROAD COMPANY,
By F. M. DUDLEY.

Witnesses:
M. T. SANDERS.
CHAS. SWARTZ.

NATIONAL SURETY COMPANY,
By MAURICE AUERBACH,
Resident Vice-President.

88 E. S. TUTTLE,
Resident Ass't Secretary.

[CORPORATE SEAL.]

Witnesses as to Surety Co.:
L. A. HEALY.
C. A. N. ETTINGILL.

Approved:
——— ———,
Counsel for Appellees.

Endorsed: Bond approved Jan'y 17, 1896. James G. Jenkins, judge. Filed Jan. 17, 1896. Oliver T. Morton, clerk.

89 STATE OF MINNESOTA, }
Department of Insurance. }

ST. PAUL, *Nov.* 13, 1895.

I, C. H. Smith, insurance commissioner of the State of Minnesota, do hereby certify that the National Surety Company of Missouri is a corporation organized under the laws of the State of Missouri, and is authorized under its charter to guarantee the fidelity of persons holding places of public or private trust, to guarantee the performance of contracts other than insurance policies, and to execute and guarantee bonds and undertakings required or permitted in actions and proceedings at law; that it appears to my satisfaction, from sufficient evidence on file in my office of commissioner of insurance of said State of Minnesota, that said corporation, the National Surety Company of Missouri, has furnished the same security which is required by law and the regulations of my department of life
90 insurance companies under the provisions of sections 355 to 358, inclusive, of chapter 34, General Laws of the State of Minnesota of one thousand eight hundred and seventy-eight (1878).

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[SEAL.]

C. H. SMITH,
Insurance Commissioner.

STATE OF MINNESOTA, }
County of Ramsey, } ss:

On this 15th day of January, 1896, before me appeared Maurice Auerbach, to me personally known, who, being by me duly sworn, did say that he is the resident vice-president of the National Surety Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its
91 board of directors, and said Maurice Auerbach acknowledged said instrument to be the free act and deed of said corporation.

C. A. N. ETTINGILL,
Notary Public, Ramsey Co., Minnesota.

92 United States Circuit Court of Appeals for the Seventh Circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 91, inclusive, contain a true copy of the transcript of the record and proceeding of the United States circuit court of appeals for the 7th circuit in the case of Northern Pacific Railroad Company *et al.*, appellants, *vs.* Musser-Sauntry Land, Logging and Manufacturing Co. *et al.*, No. 208, October term, 1894, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 17th day of January, A. D. 1896.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

93 United States Circuit Court of Appeals for the Seventh Circuit.

NORTHERN PACIFIC RAILROAD COMPANY and THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Appellants,

v.

MUSSER-SAUNTRY LAND, LOGGING & MANUFACTURING COMPANY and Chicago, St. Paul, Minneapolis and Omaha Railway Company, Appellees.

Citation.

UNITED STATES OF AMERICA, *ss:*

To the Musser-Sauntry Land, Logging & Manufacturing Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company, Greeting:

You are hereby notified that in a certain cause in equity in the United States circuit court of appeals for the seventh circuit, wherein the above-named appellants were appellants and you were appellees, the said Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of said Northern Pacific Railroad Company, have prayed an appeal to the Supreme Court of the United States from the decree in said case entered, and that such appeal has been allowed. Wherefore you are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, to show cause, if any there be, why the decree appealed from should not be reversed and set aside and relief be granted to said appellants as by *it* prayed and as to justice and equity may appertain.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of January, 1896.

JAS. G. JENKINS,
U. S. Circuit Judge.

94 Service of the foregoing citation accepted this 18th day of January, A. D. 1896.

THOMAS WILSON,
Solicitor for the Chicago, St. Paul, Minneapolis & Omaha Railway Company.

CLAPP & MACARTY,
Solicitors for the Musser-Sauntry Land, Logging and Manufacturing Company.

95 [Endorsed:] Citation.

Endorsed on cover: Case No. 16,177. U. S. circuit court of appeals, seventh circuit. Term No., 121. The Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of the Northern Pacific Railroad Company, appellants, *vs.* The Musser-Sauntry Land, Logging and Manufacturing Company *et al.* Filed February 7, 1896.

No. 121.

Brief of Bunn for Appts.

Filed Nov. 1, 1897.

SUPREME COURT OF THE UNITED STAT

OCTOBER TERM, 1897

No. 121

NORTHERN PACIFIC RAILROAD COMPANY A
OTHERS, *Appellants*,

vs.

THE MUSSER-SAUNTRY LAND, LOGGING A
MANUFACTURING COMPANY AND CHICA
ST. PAUL, MINNEAPOLIS AND OMA
RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COU
OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLANTS.

C. W. BUNN,
Counsel for Appellants.

ABBOTT PRINTING COMPANY, BOOK AND JOB PRINTERS,
91-94 UNION BLOCK, ST. PAUL.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897

No. 121

NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS, *Appellants*,

vs.

THE MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY AND CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

This appeal involves the title to a valuable body of timber land in the Northern part of Wisconsin. The suit was instituted in equity by the Northern Pacific Railroad Company and its Receivers in the Circuit Court of the United States for the Western District of Wisconsin. The bill was demurred to and the demurrer was sustained by the Circuit Court. Decree was entered dismissing the bill and appeal taken to the Circuit Court of Appeals for the Seventh Circuit where the decree was affirmed. The opinion of the Circuit Court of Appeals is at p. 59 and following of the Transcript.

The facts alleged in the bill are well and sufficiently stated by the Circuit Court of Appeals in its opinion. The complainants (appellants here) assert title under the third section of the act of Congress approved July 2, 1864, which, so far as it bears upon the questions involved, is as follows:

"Sec. 3. *And be it further enacted*, that there be and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, that the railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company, or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act." 13 Stats. 365.

The Northern Pacific Company accepted this grant December 29, 1864. On July 30, 1870, it fixed the general route of its road extending through Wisconsin within twenty miles of the lands in controversy. Thereafter it

proceeded with the survey and location of its line, and on July 6, 1882, definitely fixed that portion of its line extending opposite these lands by filing a plat thereof in the office the Commissioner of the General Land Office. The lands in controversy are within the place limits of the grant according to the plat of definite location. By September, 1882, the company had completed that part of its road coterminous with these lands and the same was examined and approved by commissioners appointed by the President as provided for in the Northern Pacific charter. These facts show that the legal title to these lands vested in the Northern Pacific Company under the act of Congress, unless they fall within the exceptions enumerated in the act. Such exceptions are of lands "sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of" when the line of road was definitely fixed.

The facts relied on to except the lands from the Northern Pacific grant are as follows: By an act entitled "An act granting lands to the State of Wisconsin to aid in the construction of railroads in said State," approved June 3, 1856 (11 Stat. 20), Congress granted to the State, for the purpose of aiding in the construction of a railroad from Madison, or Columbus, by the way of Portage City to St. Croix river or lake, between townships twenty-five and thirty-one, and thence to the west end of Lake Superior and to Bayfield, every alternate section of land designated by odd numbers, for six sections in width, on each side of said road. The act further provided that, in case it should appear that the United States had, when the line of said road was definitely located, sold any sections or parts thereof, granted as aforesaid, or that the right of pre-emption had attached to the same, then it should be lawful for any agent or agents to be appointed by the governor of the State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections or parts of sections above specified, so much lands, in alternate sections, or parts of sections, as should be equal to such lands as the United States had sold or otherwise appropriated, or to which the right of pre-emption had attached: Provided,

lhat the lands so located should in no case be furth
than fifteen miles from the road, and selected for and
account of such road.

The State accepted this grant and bestowed that po
tion of it which pertained to the line from the St. Croi
river, or lake, to the west end of Lake Superior and
Bayfield upon the St. Croix and Lake Superior Railroa
Company. On September 20, 1858, this company definitel
located the line of its road between these points. Th
lands in controversy did not fall within either the plac
or indemnity limits as established under this grant.

By an act approved May 5, 1864 (13 Stat. 66), entitle
"An act granting lands to aid in the construction of cer
tain railroads in the State of Wisconsin," it is provided

"Section 1. That there be and is hereby granted t
the State of Wisconsin, for the purpose of aiding
in the construction of a railroad from a point on the
St. Croix river, or lake, between townships twenty-
five and thirty-one, to the west end of Lake Supe-
rior, and from some point on the line of said rail-
road, to be selected by said State, to Bayfield, every
alternate section of public land, designated by odd
numbers, for ten sections in width on each side of
said road, deducting any and all lands that may have
been granted to the State of Wisconsin for the same
purpose, by the act of Congress of June three,
eighteen hundred and fifty-six, upon the same terms
and conditions as are contained in the act granting
lands to the State of Wisconsin, to aid in the con-
struction of railroads in said State, approved June
three, eighteen hundred and fifty-six. But in case
it shall appear that the United States have, when
the line or route of said road is definitely fixed,
sold, reserved, or otherwise disposed of, any sec-
tions or parts thereof, granted as aforesaid, or that
the right of pre-emption or homestead has attached
to the same, then it shall be lawful for any agent
or agents, to be appointed by said company, to
select, subject to the approval of the Secretary of
the Interior, from the public lands of the United
States nearest to the tier of sections above specified,
as much land in alternate sections or parts of sec-
tions, as shall be equal to such lands as the United
States have sold or otherwise appropriated, or to

> which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption or homestead right has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said State for the use and purpose aforesaid: Provided, that the lands to be so located shall in no case be further than twenty miles from the line of said roads, nor shall such selection or location be made in lieu of lands received under the said grant of June three, eighteen hundred and fifty-six, but such selection and location may be made for the benefit of said State, and for the purpose aforesaid, to supply any deficiency under the said grant of June third, eighteen hundred and fifty-six, should any such deficiency exist."

The State accepted this act March 20, 1865, and on the same day conferred all the lands,. rights and privileges granted by the above section, upon the St. Croix and Lake Superior Railroad Company. That company accepted the grant April 22, 1865, and by a resolution of its executive committee adopted the line as already located under the act of June 3, 1856, as the line of the road under the act of May 5, 1864. On May 5, 1865, copies of these resolutions, and of the act of the legislature of Wisconsin conferring this grant upon the St. Croix and Lake Superior Railroad Company were filed with the Secretary of the Interior. On February 28, 1866, the Commissioner of the General Land Office directed the register and receiver of the district land office to withhold the odd-numbered sections within ten and twenty miles of said line, so fixed, from sale or location, pre-emption settlement or homestead entry. This order was received and filed in the district land office on March 17, 1866.

The lands in controversy lie within the twenty mile limits of this withdrawal, but are more than fifteen miles from the line as fixed. The St. Croix and Lake Superior Railroad Company having failed to construct said railroad, the grant to it was forfeited to the State. In February, 1882, the appellee, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, hereinafter called the Omaha

Company, succeeded, under legislation of the State, to the rights of the St. Croix and Lake Superior Railroad Company; and during that year it completed the road past these lands and to the west end of Lake Superior. On May 12, 1883, and June 14, 1883, one W. H. Phipps, as agent for the Omaha Company, filed lists for selection of indemnity lands claimed as inuring to said company under said grant, including among others the lands in controversy. These selections were allowed by the officers of the district land office, but were never approved by the Commissioner of the General Land Office nor by the Secretary of the Interior. The Governor of the State of Wisconsin caused patents for the lands in controversy, with other lands, to be issued to the Omaha Company. In 1885 and 1886 the Omaha Company executed deeds for these lands to the grantors of the Musser-Sauntry Land, Logging and Manufacturing Company, which company acquired whatever interest was conveyed to the Omaha Company by the State. The Secretary of the Interior having completed the adjustment of the grants made by the acts of 1856 and 1864, it was ascertained in 1889 that these grants were satisfied without the lands in controversy; and on November 25, 1889, the Omaha Company relinquished these lands with others, and requested that the attempted selection should be cancelled, which cancellation was made in February, 1890. In November, 1889, the Musser-Sauntry Company, having ascertained that these lands would not inure to the railroad company under the grant, applied to purchase the same under the provisions of an act of Congress approved March 3, 1887. The register and receiver of the district land office, disregarding the Northern Pacific Company's protest, allowed the application, and accepted the cash tendered for the land. In February, 1890, the Secretary of the Interior, in a ruling made in the course of the adjustment of the Omaha Company's grant, held that the indemnity lands under the act of May 5, 1864, reserved by order of the Commissioner of the General Land Office of February 28, 1866, were, by reason of such reservation, excepted from

the operation of the grant to the Northern Pacific Company. On December 19, 1890, this ruling was reaffirmed and is still in force in the Department. On March 5, 1891, in accordance with the rulings of the Secretary, the Musser-Sauntry Company made a new application to purchase the lands in controversy, which was allowed; and on May 5, 1891, the Musser-Sauntry Company made a cash entry of these lands. The Northern Pacific Company appealed from this allowance, but on October 3, 1892, the Commissioner of the General Land Office affirmed it, holding that these lands were excepted from the operation of the grant to the Northern Pacific Company because of the withdrawal order of 1866.

ASSIGNMENT OF ERRORS.

The errors are properly assigned in the record (Transcript, pp. 60–62).

The whole question involved in the case is presented by the second assignment of error which is: "That said court held that the lands in controversy were reserved and excepted from the grant to said Northern Pacific Railroad Company by the order of withdrawal made February 28, 1866."

ARGUMENT.

The question for decision is this: Whether withdrawal from sale by the Land Department for the purpose of indemnity for possible losses in one railroad grant is a "reservation" or "disposal of" such lands so as to except them from the place limit grant of another railroad company.

It is utterly immaterial to this question which grant is prior; whether the Omaha grant or the Northern Pacific grant was earlier in date, because it is familiar and elementary law, that so far as the rights of the Omaha company are concerned, it acquired no title to, or right in this land until it made selections for indemnity approved by the Secretary. On the approval of such selec-

tions that company's title would become effective as of the date of the selection. It would not relate back to the date of the grant. On the other hand, the Northern Pacific Company's title (if that could attach) related back to the date of its grant, the lands being place lands within the description of the act. Therefore the question is exactly the same as it would be had the Omaha grant been subsequent to the Northern Pacific and the Omaha withdrawal prior to the definite location of the Northern Pacific. The whole question in either case being whether a withdrawal for indemnity under one grant, existing when a definite line is fixed under another grant, will constitute the lands "reserved" or "disposed of" so as to except them from the place limit grant of such other company.

The whole question is this: What is the true meaning of the words in the Northern Pacific and other similar grants "sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of." The policy which dictated the use of these words has been frequenly stated by this court and there ought to be now little doubt left as to their meaning. By the use of these words Congress indicated its intention to leave the public domain open to settlement pending the location of the railroads, and also to leave it open for the government to reserve whatever lands might be found necessary for public purposes, public buildings, forts, arsenels, Indian reservations and the like. But the decisions of this court, as we understand them, lend no support to the supposition that Congress intended to subtract from such grants any land in favor of other similar railroad grants subsequently attaching.

Counsel for the Omaha Company, in their brief before the Circuit Court of Appeals, treat this case as if it were the policy of Congress, that every railroad grant should be allowed its full quota of indemnity, as against any subsequent *place* grant made by Congress. Right here we take issue with counsel. The rule settled in this court is that a grant does not convey indemnity land. For losses in granted lands the company is given

a right to select indemnity within certain limits, PROVIDED there are public lands within those limits subject to the selection when that is made and approved by the Secretary. But the right of the government grantee does not attach to such lands as of the date of the grant or by force of the grant. It attaches as of the date of the selection and by virtue of the selection. If the land has been specifically conveyed by a later grant before that time, it is not subject to selection and the company having the right to select has no reason to complain. The Omaha grant itself contains an exception of lands sold, reserved, or disposed of at the time its line is definitely fixed, and, as the Northern Pacific grant of place lands became effective as of the second day of July, 1864 upon the definite location of that road, such lands were taken out of the Omaha grant under the terms of the exceptions in that grant. It was decided by this court at the last term (*Northern Pacific Railroad Company* vs. *Sanders*, 166 U. S. 620), that a withdrawal on general route did not prevent the attachment of rights of third persons to the land, and the same principle would seem to apply to withdrawals for mere indemnity, either on general route or definite location.

Congress made many grants to railroad companies between 1855 and 1875. It could not know which of the lines aided would be built; it did know that many of them would not be built for years, and perhaps not at all. These grants overlapped and touched each other, or might overlap and touch each other, depending on the location of the railroads; and, if the decision of the courts below in this case is correct, it follows that place grants might be utterly defeated by mere withdrawal from sale for the purpose of indemnifying possible losses in other grants, where it would be eventually determined as it was in this case, that the lands were unnecessary to fill such losses.

The question is whether such withdrawals from public sale constitute a "reservation" or "disposition of" such lands within the intent of Congress. We submit that the word "reserved" means reserved for some public pur-

pose, and not merely withheld from sale to fill possible losses in a private grant to another railroad. The intention of Congress was first to promote settlement; second, not to embarrass public functions or operations of the United States. This purpose is fully subserved by reading the word "reserved" as including only reservations for some public or governmental purpose, and as excluding a mere withholding from public sale in order to satisfy possible losses, not yet determined to exist, in another private grant standing on the same footing as to equity and justice, and having no relation to any public or governmental use. The meaning of the word "reserved," in the Northern Pacific grant, was discussed by Mr. Justice Brewer (then Circuit Judge) in *Northern Pacific Railroad Company* vs. *St. Paul, Minneapolis & Manitoba Ry. Co.*, 26 Fed. Rep. 551–558. As there held, the word "reserved" must be construed *noscitur a sociis*. The words are in one clause of the grant "reserved, sold, granted, or *otherwise appropriated*," in another clause of the grant "sold, reserved, or *otherwise disposed of*." The word "reserved" is thus used as one of the methods of appropriation or disposal. It cannot, we submit, fairly be said that lands reserved for indemnity for unascertained and only possible losses, while yet unselected, are lands "appropriated" or "disposed of." They are not appropriated or disposed of until selection. We think the decisions of this court sustain our position.

In *Missouri, Kansas and Texas Railway Company* vs. *Kansas Pacific Railway Company*, 97 U. S. 491, p. 498, the court used this language:

> "The object of the reservation was to protect the acquisition of rights in this way to lands falling within the limits of the grant, and to exclude from its operation lands especially reserved, and lands of a special character, such as mineral lands other than those of iron or coal, the sale of which was seldom permitted anywhere, and swamp lands. The grant made was in the nature of a float, and the reservations excluded only specific tracts to which certain interests had attached before the grant had become definite, or which had been specially

> withheld from sale *for public uses*, and tracts having a peculiar character, such as swamp lands, or mineral lands the sale of which was then against the general policy of the government. *It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads.*"

In the case of *St. Paul and Pacific Railroad Company* vs. *Northern Pacific Railroad Company*, 139 U. S. 1, the court considered the conflict at the intersection of the Northern Pacific grant and the St. Paul and Pacific grant. It was held the St. Paul and Pacific grant was later in point of time. The case involved both place lands and indemnity lands. The argument was made by counsel (see Judge Young's brief) that upon the filing of the Northern Pacific plat the grant attached to those odd sections only, to which the United States at that moment had full title, which they had not previously sold, granted, reserved, or otherwise appropriated; that it did not attach to any lands which before that moment had been granted to the State to aid the St. Paul and Pacific Company's line. But this court said, p. 17:

> "But we are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself. *Missouri, Kansas & Texas Railway* vs. *Kansas Pacific Railway*, 97 U. S. 491, 498, 499."

As to lands withdrawn for indemnity for the Northern Pacific Company, which fell within the place grant of the St. Paul and Pacific Company, the court was apparently careful *not* to hold that the withdrawal for indemnity would except the lands out of the St. Paul and Pacific grant. The ground on which the court placed the award of these lands to the Northern Pacific was, that all the lands within such indemnity limits were not sufficient to satisfy the ascertained losses; that there was therefore no occasion for the exercise of any right of selection, for they were all appropriated by the grant. It was a case

where the grantee had a right to select and receive every acre of land within the indemnity limits and more, and where, consequently, there was no occasion for any selection, the indemnity lands passing by the grant itself.

But the court did decide that lands included in a subsequent railroad grant were not lands granted or disposed of by the United States within the true meaning of the exceptions in the Northern Pacific grant. If the word "granted" in the Northern Pacific grant was not intended to include subsequent grants to aid other railways, why should the word "reserved" in the Northern Pacific grant be construed to include subsequent indemnity reservations for the benefit of another railway?

It was held in *United States* vs. *Oregon Central Railroad*, 57 Fed. Rep. 890, that a withdrawal for the benefit of the Oregon Central Railroad Company under its grant, made before the Northern Pacific had definitely fixed the location of its road, was not such a reservation as took the lands out of the Northern Pacific grant.

In *United States* vs. *Southern Pacific Railroad Company*, 146 U. S. 570, the Commissioner of the General Land Office withdrew the lands in controversy for the benefit of the Southern Pacific Company before the line of the Atlantic and Pacific was definitely fixed. The contention of the Southern Pacific was that the lands in controversy were therefore reserved at the time of the definite location of the Atlantic and Pacific. The question was there clearly presented to the court and necessarily passed upon. The case is therefore authority that the word "reserved" in this and similar clauses is subject to the same limitations that apply to the word "granted" in the same clause; it does not include a withdrawal from sale after the date of the grant for the purpose of aiding in the construction of another railroad.

The case of *Kansas Pacific Railroad Company* vs. *Atchison, Topeka and Santa Fe Railroad*, 112 U. S. 414, decides the same question. The lands in controversy in that case were within the place limits of the act of Congress of July 2, 1864, to aid in the construction of the Kansas Pacific Railroad. The company filed its map of definite

location January 10, 1866, and the lands were within its place limits. March 3, 1863, Congress passed an act granting lands to the State of Kansas to aid in the construction of a certain railroad, and on March 3 of the same year the Commissioner made a withdrawal, which included the lands in controversy. January 1, 1866, a definite location map was filed by the Atchison, Topeka and Santa Fe Company, beneficiary under this grant. It was held in the Circuit Court that the effect of this reservation was to exclude the lands from the Kansas Pacific grant. But this court reversed the ruling, saying:

> "The order of withdrawal of lands along the probable lines of the defendant's road made on the nineteenth of March, 1863, by the Commissioner of the General Land Office affected no rights which without it would have been acquired to the lands, nor in any respect controlled the subsequent grant."

In *St. Paul Railroad* vs. *Winona Railroad*, 112 U. S. 720, this court, speaking of the effect of a withdrawal of indemnity lands as against another railroad grant, says:

> "It is true that in some cases the statute requires the land department to withdraw the lands within these secondary limits from market, and in others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections. It by no means implies a vested right in said company, inconsistent with the right of the government to sell, *or of any other company to select, which has the same right of selection within those limits.*"

In *Atchison, Topeka and Santa Fe Railroad Company* vs. *Rockwood*, 25 Kan. 292, the court, in speaking of an executive order of withdrawal, reserving indemnity lands for the benefit of a railroad grant made July 26, 1866, which withdrawal was in existence at the date of the definite location of the Atchison Company's road under the grant made by Congress of March 3, 1863, says:

> "The withdrawal was simply intended to prevent persons who had no interest in the lands, or no interest prior to that of the Missouri, Kansas and Texas Railway Company, from acquiring any such inter-

> est, and not to prevent persons who did have some interest in the lands, prior to that of the Missouri, Kansas and Texas Railway Company, as the plaintiff in error in this case had, from perfecting such interest. * * * We only wish to say that the withdrawal did not operate to prevent the plaintiff from receiving and procuring any lands belonging to the United States, and otherwise subject to the plaintiff's grant, which had not yet been selected by the Missouri, Kansas and Texas Railway Company. We think that such lands were subject to the plaintiff's grant the same as though no such withdrawal had ever been made."

The case of *Sioux City and St. Paul Railroad Company* vs. *Chicago, Milwaukee & St. Paul Railway Company*, 117 U. S. 406, involves the same principle. The grant to each company in this case was by the same act. The lands had been withdrawn as indemnity for the Sioux City and St. Paul Railroad Company in 1867. After that date, in 1868, the Chicago company changed the location of that portion of its road coterminuus with a portion of the lands. So much, therefore, of the lands as fell within the place limits of the Chicago Company were reserved for demnity on behalf of the Sioux City Company at the time the Chicago Company definitely fixed its location. This court held that the title to the indemnity lands took effect only from the date of selection, and that where lands fell within the place limits of one grant and the indemnity limits of another, they should be awarded to the company in the place limits of which they fell, regardless of whether they were withdrawn by executive order for the benefit of the other company at the time of definite location of the road in the place limits of which the lands fell.

Our contention is also confirmed by the case of *United States* vs. *Colton Marble and Lime Company*, 146 U. S. 615. In this case it appears that the lands in controversy were within the indemnity limits of the Atlantic and Pacific grant of 1866 as defined by its map of definite location filed April 11, 1872. They also fell within the place limits of the grant to the Southern Pacific Railroad Company under the act of March 3, 1871. The Southern Pacific

Company had filed a map of the route of its road under this act April 3, 1871, more than a year before the filing of its map by the Atlantic and Pacific Company, and the land had, at that time, been withdrawn for the benefit of the Southern Pacific Company by order of the Commissioner of the General Land Office of April 21, 1871. It was held, however, that the map filed by the Southern Pacific Company April 3, 1871, was a map of general route, instead of a map of definite location. (See *U. S.* vs. *S. P. R. R. Co.*, 146 U. S. 598 to 603). The map of definite location was not filed by the Southern Pacific Company until 1874. (See 146 U. S. 602). As at this time the lands were, as we have stated, withdrawn by order of the Interior Department for the benefit of the Atlantic and Pacific Company, the case presents precisely the same facts as are presented by the case at bar, to-wit: a conflict of title between unselected indemnity lands claimed under the earlier grant, and place lands under the later grant, there being an executive order withdrawing the indemnity lands for the benefit of the earlier grant made *after* the date of the later grant, and *prior* to the time the map of definite location thereunder was filed. While in the case referred to the court held that the indemnity lands were excepted from the Southern Pacific grant, it plainly appears, from a reading of the opinion, that this result was arrived at solely because of a peculiar clause in the Southern Pacific grant, providing that it "should in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Company, or any other railroad company."

The court, referring to this clause, says:

> "Carefully inserted, in a way to distinguish this grant from ordinary later and conflicting grants, it must be held that Congress meant by it to impose limitations and restrictions *different from* those generally imposed in such cases." p. 617.

In *St. P., M. & M. Ry. Co.* vs. *H. & D. Ry. Co.*, decided by the Commissioner of the General Land Office December 11, 1889, was involved the question of the superiority of title as between two railroad companies to lands in their

common indemnity limits. The grant to the St. Paul, Minneapolis & Manitoba Railway Company was made by acts of Congress approved March 3, 1857 (11 Stat. 195), and March 3, 1865 (13 Stat. 536). The Hastings and Dakota Railway Company claimed under an act of Congress approved July 4, 1866 (14 Stat. 87), and the lands were within its indemnity limits as defined by its map of definite location, and were withdrawn by the Commissioner of the General Land Office April 22, 1868. They were also within the Manitoba Company's indemnity limits. The Commissioner of the General Land Office, in disposing of the conflicting rights, says:

> "I am of the opinion that either company is entitled to the right of selection, and that priority of right to the land is secured by the company which first presents its application to select the same, without regard to the dates of the grants, definite location of the lines, *or withdrawal of the lands.*"

This accords with the decision of this court in *St. Paul Railroad* vs. *Winona Railroad*, 112 U. S. 720.

If the decision of the Commissioner in this case is law, *a fortiori* is the principle applicable to the case at bar. If lands, which are withdrawn as indemnity in favor of a company having an earlier grant, may be taken as indemnity by a company having a later grant, the priority of right depending entirely on priority of selection, it is still more clear that lands withdrawn as indemnity for one company would pass by a later place grant to another company.

The court below was in error in applying to this case the decision in *Wolcott* vs. *Des Moines Co.*, 5 Wall. 681. That case rests upon peculiar facts and peculiar language in the granting act, both of which distinguish it widely from this case. In that case the grant to the State of Iowa to aid the improvement of the Des Moines river was under consideration. The grant was made several years before the railroad grant with which it was claimed to conflict. The Des Moines river grant was "for the purpose of aiding said territory to improve the navigation of Des Moines river from its mouth to the Raccoon Fork,

so called, in said territory, one equal moiety in alternate sections of the public lands in a strip five miles in width on each side of the river." A controversy had for years existed in respect to whether this grant extended the whole length of the river or only northwardly to the Raccoon Fork. Mr. Justice Nelson states the facts in regard to this controversy as follows:

> "Some year and a half after the passage of this act a question arose before the commissioner of the land office whether the grant of the odd sections within the five miles extended above this Fork. He determined that it did, and that it extended throughout the whole line of the river within the limits of Iowa. It appears, however, that he afterwards changed his opinion, and on the nineteenth June, 1848, a proclamation was issued by the President, countersigned by him, ordering a sale of some of these odd sections, among other lands lying above the Fork, and which was to take place in the following October. On the attention of the Secretary of the Treasury being called to the subject, he, after an examination of the act, determined that, upon a true construction of it, the grant extended above the Raccoon Fork, and directed that the odd section should be reserved from the sale, which was done accordingly, and the State of Iowa duly notified. This was on the sixteenth June, 1849. On the sixth April, 1850, the Secretary of the Interior, whose department had in the meantime been established, and to which the supervision and control of the General Land Office had been assigned, reversed the previous decision of the Secretary of the Treasury, and determined that the grant did not extend beyond the Raccoon Fork. But he directed that the lands should be reserved from sale which were embraced within the State's selections. The question was then brought before the President, and was referred by him to the Attorney General, who differed with the Secretary of the Interior, and concurred with the Secretary of the Treasury. But before the promulgation of this decision the President (Taylor) died, and a new cabinet coming in—and among others a new Attorney General—he overruled the decision of his predecessor and affirmed that of the Secretary of the Interior. The case

was then brought before the new President and cabinet, and the result is stated by the then Secretary of the Interior, under date of October 29, 1851, which was 'that in view of the great conflict of opinion among the executive officers of the government, and also in view of the opinions of several eminent jurists which have been presented to me in favor of the construction contended for by the State, I am willing to recognize the claim of the State, and to approve of the selections, without prejudice to the rights, if any there be, of other parties.' Under this arrangement the Secretary of the Interior approved of the odd sections above the Fork as certified, according to the act of Congress, till, in December, 1853, the number of acres amounted to over 271,572. On the twenty-first March, 1856, the commissioner of the land office again decided that the grant was limited to the Raccoon Fork, and the question was again referred to the Attorney General, who advised the Secretary of the Interior to acquiesce in the views of his predecessor (a change having taken place as to the incumbent), and to continue the approval of the lands as certified to him under the law, which was done accordingly. In the meantime, the improvement of the Des Moines river had been carried on by the State, and by the Des Moines Navigation and Railroad Company, who on the ninth June, 1854, had entered into an engagement with the State to finish the improvements, as contemplated by the act of Congress, and to expend for that purpose some $1,300,000.

"The question as to the true construction of this grant of eighth August, 1846, and in respect to which such great diversity of opinion existed among the executive officers of the government, came before this court, and was decided at the December term, 1859–60. The court held that it was limited to the Raccoon Fork, and did not extend above it."

Pending this controversy, and while litigation over it was being tried in the courts, Congress passed the railroad grant of May 15, 1856, containing this provision: "*That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpos of aiding in any objects of*

internal improvements, or for any purpose whatever, be and the same is hereby reserved from the operation of this act." This court held that Congress, in the passage of this proviso, had specially in mind the previous grant, the conflict of opinion concerning it and the pending litigation; that the peculiar words of the proviso point almost directly to this prior grant and to the dispute arising out of it among the public authorities. The improvements of the Des Moines river were then in progress, and if it turned out that the true construction of the act carried the grant above the Raccoon Fork, then no further legislation was necessary. But if the litigation turned out the other way, then Congress desired to make such provision as might be just with the lands north of Raccoon Fork claimed to come within the Des Moines river grant.

It will be noticed that substantially the same language was used in the St. Paul and Pacific grants, considered by Mr. Justice Brewer in *Northern Pacific Railroad Company* vs. *St. Paul, Minneapolis and Manitoba Railway Company*, 26 Fed. Rep. 551. There is no similar or equivalent language in the Northern Pacific grant; no reference to any existing reservation, or grant for a public purpose made by Congress. The Northern Pacific grant is of the odd sections, public at the date of the grant, whenever on the line of the road the United States has full title, not reserved, sold, granted, or otherwise appropriated. There is no exception of lands HERETOFORE reserved. The exception is of lands which may be reserved or otherwise disposed of at the date of definite location, and Congress could not have had in mind *any* withdrawal from sale, which the land department might choose to make in the future, for the purpose of indemnifying losses in some other private grant, whether later or earlier.

This case is distinguishable and entirely different from cases where the reservation or withdrawal is in existence at the time the grant is made. Such reservations are presumably within the knowledge and intent of Congress when making the grant, and under the decisions of this court have the effect to take such reserved lands out of the body of public lands presumed to be contem-

plated by the grant. But we think there is no decision of this court which places reservations for indemnity made after a grant upon a similar footing. As to lands so subsequently reserved, the ordinary rule applies that he who is prior in time is first in right; and a grant of lands in place with definite location thereunder is prior in time, because indemnity lands vest only upon selection. The general proposition is established beyond question, that in case of conflict between the place limits of one grant and indemnity limits of an earlier grant, the lands will pass as place lands under the later grant. *H. & D. Ry. Co.* vs. *St. Paul, S. & T. F. Ry. Co.*, 32 Fed. Rep. 821; *Sage* vs. *St. Paul, S. & T. F. Ry. Co.*, 44 Fed. Rep. 817; *United States* vs. *Colton Marble & Lime Co.*, 146 U. S. 615.

C. W. BUNN,
Of Counsel.

No. 121.

SUPREME COURT OF THE UNITED STATES.

Filed Oct. 22, 1897.

NO. 121.

NORTHERN PACIFIC RAILROAD COMPANY, et al.,

Appellants,

THE MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY, et al.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLEES.

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1897.

NO. 121.

NORTHERN PACIFIC RAILROAD COMPANY, et al.,
Appellants,

THE MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY, et al.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLEES.

The facts are correctly and, except as we shall hereafter point out, fully stated in the opinion of the Court of Appeals and in the brief of counsel for the appellant. But for the convenience of the court we very briefly re-state those on which we think the case turns.

The grant to appellant by the act of July 2nd, 1864, (13 U. S. Statutes 365), is:

> "Every alternate section of public lands * * * to the amount of 20 alternate sections per mile on each side of said railroad line, as said company may adopt, through the territory of the United States, and ten alternate sections per mile on each side of said rail-

road whenever it passes through any state, *and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof.*"

On July 30th, 1870, complainant fixed the *general route* of its road and filed plats thereof with the Secretary of the Interior. *On Aug. 13th, 1870,* the Commissioner of the general land office by direction of the secretary of the interior sent to the local land officers a diagram or map *showing the general route* and requested them "to withdraw from sale or location, pre-emption or homestead entry all the odd numbered sections of public lands falling within the limits of twenty miles, designated on that map." *On September 27th, 1870,* that map was received and the lands withdrawn as requested. *On July 6th, 1882, complainant definitely fixed that portion of its line opposite these lands.* They are within the twenty mile limits of the withdrawl on the general route, and also within the twenty mile (place) limits of complainant's grant as the limits were adjusted and fixed according to the map of definite location. The sole foundation of appellant's claim is this act and the doings aforesaid.

On the other hand, the following facts are to be noted:

By the Act of *June 3rd, 1856,* (11 Statutes, 20) a grant was made to the State of Wisconsin in aid of the line of defendant railway company, of every alternate section of land designated by odd numbers for six sections in width on each side of the line with the right to select indemnity within the fifteen mile limits. That line was *definitely fixed September 20th, 1858.* (Record p. 11.) That grant was enlarged by the Act of *May 5th, 1864,* (13 Statutes, 66). The language of the grant by the latter act is:

"That there be and is hereby granted * * *

every alternate section of public land designated by odd numbers for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose by the Act of *June 3rd, 1856*, upon the same terms and conditions as are contained" in said Act of 1856. "But in case it shall appear that the United States have when the line or route of said road is definitely fixed, sold, reserved or otherwise disposed of any sections or parts thereof granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful * * * to select * * * from the public lands of the United States nearest to the tiers of sections above specified, as much land in alternate sections, or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold and to which pre-emption or homestead right has attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid,) shall be held by the state for the use and purpose aforesaid, provided that the lands to be so selected shall in no case be farther than twenty miles from the line of the said road."

These lands are within the twenty mile (indemnity) limits of that grant and *they were withdrawn* by the secretary of the interior in aid of it in *February or March, 1866*, (Rec. p. 14) *more than four years before even the general route of complainant's line was fixed and more than six years before complainant definitely fixed its line*. That withdrawal remained unrescinded and unmodified until 1889 (Record page 20).

That the defendant railroad company succeeded to all the rights of the state or of any prior donee of the state as to or under that grant is not questioned (Recd. pages 16 and 17).

In 1883 the defendant railway company selected these and other lands in its indemnity limits in lieu of lands lost in

its place limits. Those selections were approved by the local land officers and transmitted to the Commissioner of the General Land Office for his approval. Afterwards, in the same year, the state of Wisconsin caused patents for these lands to be issued to the defendant railway company and it thereafter, and before its selections were disapproved by the Secretary of the Interior, sold and executed deeds therefore to the grantor of this defendant the Musser-Sauntry Company which, the railway company's title having failed, purchased them pursuant to the provisions of Sec. 5 of the Act of March 5th, 1887 (24 U. S. Statutes 557-558). The suit is brought to enjoin the issue of the patents therefor. (Record p. 17-21.)

The question that lies at the foundantion of the appellant's right to maintain this action is: Did the grant to it include these lands? If not, it follows, of course, that it has no standing in court or right to question the title of this defendant, the Musser-Sauntry Company.

ARGUMENT.

It is irrelevant to argue that the grant to the appellant was *in praesenti*. A grant of what? This question is answered by the plain language of the act—i. e. "Lands not *reserved* sold or otherwise appropriated, *and free from pre-emption or other claims or rights at the time the line of road was definitely fixed.*" Though this language is too clear to admit of misconstruction, this Court has been at different times called upon to construe it.

Mr. Justice Field, delivering the opinion of this court in *St. Paul & Pac. Co.*, vs. *N. P. Co.*, 139 U. S. 5, construing this grant said:

> "The route, not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification: but when identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this

sense that the grant is termed one *in praesenti*; that is to say, it is of that character as to all lands within the terms of the grant and not reserved from it at the time of the definite location of the route."

And Mr. Justice Miller, delivering the opinion of this Court in Dunnmeier's case, 113 U. S. 640, construing a similar grant used the following language:

> "These odd numbered sections [in the primary limits] were to be those not sold, reserved or otherwise disposed of by the United States and to which a pre-emption or homestead right had not attached at the time the line of said road is definitely fixed. When the line was fixed, * * * then the criterion was established by which the lands, to which the road had a right, were to be determined. * * * This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved or otherwise disposed of by the United States and to which a pre-emption or homestead claim had attached, * * * *In regard to all such sections, they were not granted. The express and unequivocal language of the statute is that the odd sections not in this condition are granted. The grant is limited by its clear meaning to the other odd sections and not to these.*"

See also to the same effect the language of Mr. Justice Harlan, delivering the opinion of this court in *Northern Pacific Ry. Co. vs. Saunders, 166 U. S., 629.* He says:

> "We have seen that the act of July 2nd, 1864, [this act] under which the railroad company claims title, excluded from the grant made by it all lands that were not *at the time the line of the road was definitely fixed* free from pre-emption or other claim or right."

That such a withdrawal, as was made in this case, unless it was illegal, was a "reservation" within the scope and purview of that act, and that the land department may with-

out any express legislative authority legally make such a withdrawal, is not an open question.

Northern Pac. R. Co. v. St. Paul R. Co., 26 Fed., 551, 560-562.

Wis. Cent. R. Co. vs. Forsyth, 159 U. S. 46, 54-55.

Spencer vs. McDougal, 159, U. S. 62 et seq.

St. Paul &c. R. Co. vs. N. P. R. Co., 139 U. S., 1, 17, 18.

Hamblin vs. Western Land Co., 147 U. S., 531.

As said by the court in *St. P. & Pac. R. Co. vs. N. P. R. Co., 139 U. S., 18,* "After such withdrawal no interest in the lands granted can be acquired against the rights of the company except by special legislative declaration."

Nor can the fact be material or affect this question that it was found on the final adjustment of the grant that the withdrawal included more lands than were required to make up for the loss in the place limits. If the defendant railroad company had the right to select lien lands within its indemnity limits the land department had a right to withdraw the lands within these limits until the extent of the losses in the place limits could be ascertained and selections therefor made. The amount of such withdrawals was a matter for the determination of that department that this court will not revise; and the fact that on the final adjustment of the defendant R. Co's. grant it was found that it was not entitled to all of the lands so withdrawn, did not establish complainant's right to those to which its claim failed.

Hamblin vs. Western Land Co., 147 U. S., 531.

Spencer vs. McDougal, 159 U. S. 62, 64.

N. P. R. Co. vs. St. Paul Co., 26 Fed., 551, 560 et seq.

Wolcott vs. Des Moines Co. 5 Wal. 681.

Bullard vs. Des Moines R. Co., 122 U. S. 167.

Kansas Pac. R. Co. vs. Dunmeier, 113 U. S. 629, 633-34, 640 et seq.

Bardon vs. R. Co., 145 U. S. 535.

N. P. R. Co. vs. Saunders, 166 U. S. 620, 630, 633, 635 636 and cases cited there.

Wis. Cent. R. Co. vs. Forsyth, 43 Fed. 867, 881-882 et seq.

This, we think, is not questioned by counsel for complainant. As we understand his contention, it is that *any withdrawal or reservation* of lands for indemnity for the defendant railway company was inoperative, illegal and void, if, on the definite location of the line of appellant, they were found to be within its place limits. At any rate his position if tenable leads to this consequence. We quote from his brief, (pages 9 and 10):

> "The question is whether such withdrawal from public sale constitute a 'reservation' or 'disposition' of such lands within the intent of congress. We submit that the word 'reserved' means reserved for some public purpose, and not merely withheld from sale to fill possible losses in a private grant to another railroad. The intention of Congress was, first, to promote settlement; second, not to embarrass public functions or operations of the United States. This purpose is fully subserved by reading the word reserved as including only reservations for some public or govermental purpose, and as excluding a mere withholding from public sale in order to satisfy possible losses, not yet determined to exist, in another private grant standing on the same footing as to equity and justice." And he explains, on page 8, what he means by "reserved for some public purpose," viz: for "public buildings, forts, arsenals, Indian reservations, and the like."

The position is irreconcilable with *N. P. R. Co. vs. Sanders*, 46 Fed. 239 ib. 7 U. S. App. 47; ib. 166 U. S. 620, and with many other cases decided by this court, some of which we have above cited and is *unsupported either by principal or authority*. The statute, as has been shown, declares that lands "*reserved*, sold, granted or *otherwise appropriated* and not *free* from pre-emption or *other claims or rights*" at the time the line of complainant was definitely fixed were not

granted. Broader or clearer language could hardly have been used, and we respectfully submit that neither reason nor authority can be adduced in support of the proposition that congress did not mean what it said.

The rule in such cases is thus stated by Justice Denman in *Nuth vs. Tamplin*, Law Rep. 8 Q. B. Div., 250:

> "It certainly is a right doctrine to apply to the consideration of all acts of Parliament that unless there are strong reasons for it words should not be imported into an act of Parliament, either by way of extension or limitation."—And by Jessel, Master of the Rolls, in the same case, p. 253: "Now, anyone who contends that a section of an act of Parliament is not to be read literally, must be able to show one of two things, either that there is some other section which cuts down its meaning or else that the section itself is repugnant to the general purview of the act."—

And by Mr. Justice Davis, delivering the opinion of this court in *Newhall vs. Sanger*, 92 U. S., 795.—"There is no authority to import a word into a statute in order to change its meaning."

There is no other section in the act making the grant to the complainant, nor any act in *pari materia*, that cuts down the meaning of that section; nor, is that section repugnant to the general purview of the act.

The authorities cited and relied on by complainant's counsel in support of his contention establish or recognize two well settled legal propositions:

(a) That as to lands in the overlapping place limits of such grants the elder takes the title, irrespective of the dates of the location of their respective lines.

(b) That in the absence of any express provision it will not be presumed that it was intended by a latter grant in aid of a public improvement to interfere with or subtract from an earlier grant for a like improvement.

Beyond these two propositions no case cited by him goes. Both propositions support our contention. The first

is unquestioned. (*See M., K, & T. R. Co. vs. Kan. Pac. R. Co., 7 Otto. 491; St. Paul & Pac. R. Co. vs. N. P. R. Co., 139 U. S. 1, 15.*) The second is directly in point in favor of the principle for which we contend and accords with well settled legal principles and with the decisions of this court. No inference can be drawn from the making of the latter grant that Congress intended to interfere with or lessen the earlier that was presumably equally deserving of aid. No provision is found in the later that can be construed into a repeal or an intention to repeal any clause or portion of the earlier or to take away any right conferred by it; and in the absence of an express repeal, one act is construed to repeal or modify another only when the provisions of the two acts are irreconcilable. Here there is no necessary inconsistancy. This rule is peculiarly applicable in the construction of these land grants.

Mr. Justice Miller, delivering the opinion of this court in *Broder vs. The Water Power Co., 11 Otto. 274*, thus clearly states the rule in such cases:

> "We have had occasion to construe a very common clause of reservation in grants to other railroad companies and in aid of other works of internal improvement, and in all of them we have done so in the light of the general principle that congress in the act of making these donations cannot be supposed to exercise its liberality at the expense of pre-existing rights, which, though imperfect,,were still meritorious and had just claims to legislative protection."

And Mr. Justice Field, delivering the opinion of this court in Bardon's case, 145 U. S., 535, at page 543, says:

> "Three justices, of whom the writer of this opinion was one, dissented from the majority of the court in the Leavenworth case, [which held that such grants are "confined to lands that congress could rightfully bestow without disturbing existing relations,"] but the decision has been uniformly adhered to since its announcement, and this writer after a much larger experience in the consideration of public land grants since that time, now

readily concedes that the rule of construction adopted, that in the absence of any express provision indicating otherwise a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer both to the government and to private parties than the rule which would pass the property subject to the liens and claims of other." See also *U. S. vs. Oregon R. Co., 57 Fed. 890, 894.*

It is irrelevant to argue that congress *had the power* to grant any and all of the lands in the indmnity limits of the grant to the defendant railroad company until they were selected by it. True. So it is true that congress had the power to grant lands on which a pre-emption claim had been filed and initiated. The question here is not what congress *could do* but what it *did.*

The contention of counsel, carried to its logical consequence, is that until the complainant saw fit to locate its line no lands could be selected or gotten by defendant railway company within its indemnity limits; that its rights to indemnity within any possible limits that complainant might fix were indefinitely suspended. It cannot be presumed that congress intended anything so unreasonable and unjust. Nor is there force in the argument that, because the complainant's right as to lands in its primary limits related back to the date of its grant while the defendant railroad company's rights to lands in its indemnity limits took effect as of the date of selection, therefore the defendant's rights were postponed to those of the complainant. The rights of the defendant railroad company were all bottomed on the grant in aid of its line. *That gave the right to it or to the State for it to select lieu lands within those limits, (U. S. vs. Colton Marble & Lime Co., 146 U. S. 615, 618;)* and authorized the land department to at once withdraw the odd numbered sections within those limits in pursuance of and in aid of that grant. Though inchoate these were very valuable rights and they existed when and before the grant to the complainant was made. The withdrawal made in accordance with the uniform practice in such cases was therefore valid unless that right to select and the right to withdraw were repealed and revoked by the later

grant to the complainant. And we submit that neither reason nor authority justifies the contention that it is to be presumed or inferred from the making of the later grant to the appellant that congress intended to interfere with those pre-existing rights.

We think it unnecessary to comment at length on the cases cited by counsel for appellant or to refer to all of them. None of them declares any principle or doctrine touching any question here involved other than those above stated.

In *Mo., K. & T. R. Co., plaintiff in error, vs. Kan. Pac. R. Co., 97 U. S. 498*, the court after pointing out that the grant to the defendant in error was earlier than the grant to the plaintiff in error, used this language:

> "The grant to this plaintiff in error was in the nature of a float, and the reservations excluded only specific tracts to which certain interests had attached before the grant had become definite, or which had been specifically withheld from sale for public uses, and tracts having a peculiar character, such as swamp lands or mineral lands, the sale of which was then against the general policy of the government. *It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads.*"

The words italicized are relied on by counsel as sustaining his position, but, they admit of no such construction. The question before the court was whether those words should be so construed *in favor of a later grant*, and the court decided that question in the negative. That was the only question in the case, or, as the opinion clearly shows, in the mind of the learned judge who delivered the opinion. He says:

> "The rights of the contesting corporations to the disputed tracts are determined by the dates of their respective grants and not by the dates of the location of the routes of the respective roads, although in this case the location of the route of the plaintiff's road was earlier than that of the defendant's road. This con-

sideration disposes of the case and requires the affirmance of the decree of the Supreme Court of Kansas without reference to the reservations contained in the grant to the defendant."

N. Pac. R. Co. vs. St. P. M. & M. R. Co., 26 Fed. 551, 558, and same case on appeal, 139 U. S. 1-19, cited by counsel, is against him. The contest in that case embraced lands in place, indemnity, lands and lands within withdrawal limits, and the court held according to the long established rule that as between two grants, not priority of construction nor priority of location, but priority of grant, determined the title (26 Fed., 551); and that the grant to the Northern Pacific Company was prior. (Ib., p. 554, 556.) A question then arose which we state in the language of the court (Ib. p. 557): "Assuming the priority of the N. Pac. grant, it is earnestly contended that by its terms all *subsequent grants* made prior to the definite location of its road are excepted. * * * Stress is laid on the use of the word 'granted' in the one act, [that to the N. P. Co.,] and its omission from the other, [to the U. P. Co.] This word, it is claimed, has a well recognized meaning in the land legislation of congress distinct from 'sale,' 'pre-emption,' or 'homestead.' Its use indicates the intention of *future grants* within the territory, and notifies the grantee that *such future grants*, if made before its definite location, will have precedence. In fact, it reserves from this *all such future grants*. (Ib. 557.)"

The court having thus stated the contention of counsel for the St. Paul company, answered it as follows:

"At the hearing the arguments in favor of those views were forcibly presented and seemed to me very persuasive. Subsequent reflection has led me to a different conclusion. I state briefly my reasons. The decision in 97 U. S., *supra*, places all land grant roads on the same plane,—and that, a different one from that occupied by settlers and private purchasers,—and settles all conflicts of title by a rule clear, simple and just, viz: *priority of grant*. Congress may fairly be regarded as standing indifferent between all roads, and

intending to apply this just and simple *rule of priority* as between successive beneficiaries. Before any departure from such intent is adjudged, the fact should be made clear. The burden is on the later beneficiary averring such departure." (Ib. 557, 558.)

The court, after further discussion of the question, added:

"I can but think the rule laid down in 97 U. S., *supra*, applicable to the N. P. land grant, and therefore must hold that the title to the lands in place antedates that of the defendant." (Ib. 559.)

A question remained—whether lands in the indemnity limits of the N. P. Company that were withdrawn in 1870 were excepted from the grant of 1871 to the St. Paul Company and the Court held *that the withdrawal was valid and therefore that the grant to the latter company "never had operative force within its limits,"* (Ib 560, 563.) When the case came before this court it held that the grant to the N P. Co. antedated the grant to the St. Paul Company, adding:

"And the rule has long been settled that when different grants cover the same premises, the earlier takes the title,"(139 U. S. 15.)

The court then proceeded to state the contention of the counsel for the St. Paul Company as fallows:

"It is also argued against the priority of the plaintiff's claim that by the terms of the act making the grant to the N. P. Company *all subsequent grants* prior to the definite location of its road are accepted;" (p. 16) and answered it as follows: "But, independently of this conclusion, we are of opinion that the exception in the act making the grant to the N. P. Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself. *Mo., K. & T. R. Co. vs. Kan. Pac. R. Co., 97 U. S., 491, 498, 499. Besides, the withdrawal made by the Secretary of the Interior of lands within the*

forty mile (indemnity) limits on the 13th of August, 1870, preserved the lands for the benefit of the N. P. Company from the operation of any subsequent grants to other companies not specifically declared to cover the premises." (Ib. p, 17.)

It is thus apparent that these cases are authorities *against* the appellant. And when counsel says:

> "As to lands withdrawn for indemnity for the Northern Pacific Company which fall within the place grant of the St. Paul & Pac. Company, the court was apparently careful *not* to hold that the withdrawal for indemnity would except the lands out of the St. Paul & Pacific grant," (See his brief p. 11,) he undoubtedly overlooked the language of the opinion in this court and the Circuit Court above quoted.

U. S. vs. Oregon &c. R. Co., cited on page 12 of his brief, decides this, and, so far as any question in this case is concerned, nothing more—that "the reservation in the grant to the complainant of granted lands was not made in contemplation of a subsequent bestowal of those lands in aid of another road." 57 Fed. 894.

The only other case cited that we desire to refer to is *U. S. vs. Colton Marble & Lime Co., 146 U. S. 615.*

The facts in that case were, that the United States made a grant of lands to the Atlantic & Pacific R. Co., in 1866, and a grant to the Southern Pacific R. Co., in 1871, to aid in the building of their respective lines of road. The lands involved were in the indemnity limits of the former grant and in the place limits of the latter. In the latter grant it was expressly provided, "That this section—[granting the lands to the Southern Pacific Co.]—shall in no way impair the rights, present or prospective, of the Atlantic & Pacific R. Co., or of any other railway company." The Atlantic & Pacific Company failed to build its line past the lands and its rights under the grant to it were forfeited. The question was, whether the Southern Pacific Company was entitled to the lands. The contention of the United States—the complainants—was,

"That because they were within such indemnity limits [of the Atlantic & Pacific Company,] they were not of the lands granted or intended to be granted to the Southern Pacific Company." This court held that that contention was justified by the proviso above quoted. Mr. Justice Brewer, delivering the opinion of this court, said:

> "The only way in which force can be given to this proviso is to hold that the indemnity lands of the Altantic & Pacific Company were exempted from the grant to the Southern Pacific Company, for, if not exempted, the former company's prospective right of selection would be to that extent impaired. * * * Being within the granted limits of the Southern Pacific, all its rights thereto vested at once at the time of the filing of the map of definite location, and were not and could not be added to after that time; everything it could have in those lands it had then, and at that time there was an existing prospective right on the part of the Atlantic & Pacific Company to make a selection. That prospective right would be impaired by the transfer of the title of a single tract to the Southern Pacific. Hence it follows that the title to none of these indemnity lands passed or could pass to the Southern Pacific Company."

This conclusion was arrived at wholly irrespective of any question of withdrawal. The decision or discussion of any such question would have been wholly irrelevant. Whether they were withdrawn or not they did not fall within the grant to the Southern Pacific Company.

It is unnecessary to add that no inference, therefore, could be drawn from the fact that the court did not discuss the effect of a withdrawal, and it is unnecessary to inquire whether there was any withdrawal in that case.

Apparently forgetting his contention "that the word 'reserved' means reserved for some public purpose or not merely withheld from sale to fill possible losses in a private grant to another railroad," counsel argues:

> "The Omaha grant itself contains an exception of

lands sold, reserved or otherwise disposed of at the time its line is definitely fixed, and as the Northern Pacific grant of place lands became effective as of the 2nd day of July, 1864, upon the definite location of that road such lands were taken out of the Omaha grant under the terms of the exceptions of that grant." See his brief page 9. The force of this argument is not apparent. The exception in the Omaha grant referred to is found in Section 1 of the act of May 5th, 1864 (13 Stat., 66,) and is quoted at length supra p. 4-5.

(a) That exception clearly only refers to lands in the primary limits, not to those in the indemnity limits, as these are.

(b) The line or route of defendant railroad company's road was definitely fixed before the grant to appellant.

(c) Such a reservation is not for the benefit of other *subsequent grants* for a like public improvement.

There is not a shadow of foundation for the contention (complainant's brief, p, 9,) that a withdrawal of lands for indemnity does not prevent the attachment of rights of third parties.

Hamblin vs. Western Land Co., 147 U. S., 531, 536 and cases there cited.

St. Paul & Pac. R. Co. vs. N. P. R. Co. 139 U. S., 1, 17, 18, and other cases above cited.

Secondly.

Even if the complainant was entitled to these lands, it could not maintain this suit.

(a) As the acts alleged do not constitute irreparable injury and complainant's title is denied, the court will not interpose by the extraordinary remedy of injunction.

1st High on Injunctions, 3rd Ed., Secs. 698, 699, 700, 701, 713, 718, 719, 723.

(b) Complainant has an adequate remedy at law if it is entitled to any relief, and for that reason a bill in equity will not lie.

(c) The United States not being parties to this suit an injunction would not prevent *the issuance* of a patent to the defendants; and when executed and recorded a patent will pass the title (if the United States have a title) *without acceptance* by either of these defendants.

U. S. vs. Shurz, 12 Otto, 378, 408.

Bicknell vs. Comstock, 113 U. S., 149.

THOMAS WILSON,
Counsel for Defendants.

NORTHERN PACIFIC RAILROAD COMPANY *v.* MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 121. Argued November 30, December 1, 1897. — Decided December 20, 1897.

The withdrawal from sale by the Land Department in March, 1866, of lands within the indemnity limits of the grants of June 3, 1856, and May 5, 1864, to the State of Wisconsin to aid in the construction of a railroad, exempted such lands from the operation of the grant to the Northern Pacific Railroad Company by the act of July 2, 1864; though it may be

Statement of the Case.

that a different rule would obtain if the grant to the State had been of a later date than that to the Northern Pacific Company.

As to place lands, it is settled that, in case of conflict, the title depends on the dates of the grants, and not on the times of the filing of the maps of definite location.

It is not intended hereby to question the rule that the title to indemnity lands dates from selection, and not from the grant: but all here decided is, that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant, and made prior to the filing of the map of definite location by a company having a later grant — the latter having such words of exception and limitation as are found in the grant to the plaintiff — it operates to except the withdrawn lands from the scope of such later grant.

THE facts in this case are as follows: On June 3, 1856, c. 43, 11 Stat. 20, Congress made a grant to the State of Wisconsin to aid in the construction of a railroad of every alternate section of land designated by odd numbers, for six sections in width, on each side of the line, with the right to select indemnity within fifteen-mile limits. The line of this road was definitely fixed September 20, 1858. This grant was enlarged by the act of May 5, 1864, c. 80, 13 Stat. 66, to one of ten alternate sections on each side per mile with indemnity limits extended to twenty miles from the line of the road. The Chicago, St. Paul, Minneapolis and Omaha Railway Company, one of the defendants herein, became the beneficiary of this grant. The road was afterwards constructed, and the lands in controversy are more than fifteen but less than twenty miles from the line of definite location and construction. In March, 1866, the lands within the indemnity limits named in the act of 1864 were by the Secretary of the Interior withdrawn from sale and notice thereof given to the local land officers. This withdrawal remained unrescinded and unaltered until 1889. In 1883 the defendant railway company selected the lands in controversy in lieu of lands lost in its place limits. These selections were approved by the local land officers and transmitted to the commissioner of the general land office for his approval. In the same year the State of Wisconsin issued patents for the lands to that company, which thereafter sold and conveyed them to the grantor of its co-defendant, the land, logging and manufacturing company. On a readjust-

ment of the land grant the railway company's title failed, and thereafter the grantee of the railway company purchased them, pursuant to the act of March 3, 1887, c. 376, 24 Stat. 556.

On the other hand, the Northern Pacific Railroad Company, plaintiff and appellant, on July 2, 1864, c. 217, 13 Stat. 365, 367, received a grant from Congress. The third section of the act making this grant contains this description of the lands granted:

"Every alternate section of public land . . . to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile, on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof."

On July 30, 1870, plaintiff fixed the general route of its road and filed plats thereof with the Secretary of the Interior. On August 13, 1870, a withdrawal of the lands within twenty miles of this route was ordered in aid of the grant. On July 6, 1882, plaintiff definitely fixed that portion of its line opposite these lands. They are within the limits of the above-mentioned withdrawal, and also within the place limits of plaintiff's grant, as those limits were adjusted and fixed according to the map of definite location. Relying upon the title acquired by this grant, and the proceedings had thereunder, as above described, the plaintiff filed its bill on May 3, 1893, in the Circuit Court of the United States for the Western District of Wisconsin, to restrain the issue of patents to the manufacturing company, and to quiet its own title. A demurrer to this bill was, in May, 1894, sustained, and a decree

entered dismissing the bill. On appeal to the Court of Appeals for the Seventh Circuit this decree was affirmed, 34 U. S. App. 66, and thereupon the plaintiff brought the case to this court for review.

Mr. C. W. Bunn for appellants.

Mr. Thomas Wilson for appellees.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

But a single question is presented in this case, and that is whether the withdrawal from sale by the Land Department in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864 exempted such lands from the operation of the grant to the plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff, and that before the time of the filing of plaintiff's maps of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had "full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed."

The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the Government under the general land laws. The act of the Secretary was in effect a reservation. *Wolcott* v. *Des Moines Co.*, 5 Wall. 681; *Wolsey* v. *Chapman*, 101 U. S. 755, and cases cited in the opinion; *Hamblin* v. *Western Land Company*, 147 U. S. 531, and cases cited in the opinion. It has also been held that such a withdrawal is effective against claims arising under subsequent railroad land grants. *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1, 17, 18; *Wisconsin Central Railroad* v. *Forsythe*, 159 U. S. 46, 54; *Spencer* v. *McDougal*, 159 U. S. 62.

While it is true that the intent of Congress in respect to a land grant is to be determined by a consideration of all the provisions of the statute, and that the word "reserved" may not always be held to include lands withdrawn for the purpose of supplying possible deficiencies in some prior land grant, yet, as that is the ordinary scope of the word, if any narrower or different meaning is to be attributed to it in this grant the reasons therefor must be clear. The use of a word which has generally received a certain construction raises a presumption that Congress used it in this grant with that meaning, and it devolves on the one claiming any other construction to show sufficient reasons for ascribing to Congress an intent to use it in such sense. It is said that the phraseology of the various Congressional grants is different, and therefore each one must be considered by itself. This, in a general way, may be admitted, but at the same time the frequent use of a certain word in a particular sense is, to say the least, very persuasive that it was used in a like sense in this grant.

But beyond the significance of the word "reserved," alone, there are other words in the act which, taken in connection with it, make it clear that these lands do not fall within the grant. "Otherwise appropriated" is one term of description, and evidently when the withdrawal was made in 1866 it was an appropriation of these lands so far as might be necessary for satisfying that particular grant. It is true it was not a final appropriation or an absolute passage of title to the State or the railway company, for that was contingent upon things thereafter to happen; first, the construction of the road, and, second, the necessity of resorting to those lands for supplying deficiencies in the lands in place; still it was an appropriation for the purpose of supplying any such deficiencies. Again, in the description, are the words "free from pre-emption or other claims or rights." Certainly, after this withdrawal, the Wisconsin Company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the

right? But the language is not simply "free from rights," but "free from claims," and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road. *Northern Pacific Railroad* v. *Sanders*, 166 U. S. 620. And such is the general rule in respect to railroad land grants.

Leavenworth, Lawrence &c. Railroad v. *United States*, 92 U. S. 733, furnishes an apt illustration. In that case the granting act contained this provision: "That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act." And it was contended that an Indian reservation was not excepted from the grant because the lands were not reserved to the United States. Upon this the court said (pp. 741, 747): "Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of it was not necessary; because the policy which dictated them confined them to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. . . . Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference, in this respect, whether it be appropriated for Indian or for other purposes." See also *Newhall* v. *Sanger*, 92 U. S. 761, in which it was provided that the grant "shall not defeat or impair any preemption, homestead, swamp land or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler;" and it was held that the lands within the boundary of an alleged Mexican or Span-

ish grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands were not within the grant to the company. In *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, 606, it was said: "Indeed, the intent of Congress in all railroad land grants, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as at that time are public lands."

There is no force in the contention that this construction might operate to defeat the entire grant to the plaintiff. At the time of the passage of the act of 1864 only in the vicinity of the proposed eastern and western termini were there any settlements. The great bulk of the territory through which the road was to pass was almost entirely unoccupied. Congress, fixing the time for commencing and for finishing the work within two and twelve years, respectively, (Sec. 8,) contemplated promptness in the construction of the road, intending thereby to open this large unoccupied territory to settlement. In view of the road's traversing a comparative wilderness it made a grant of enormous extent. Within the unoccupied territory thus to be traversed there were few settlers and few, if any, land grants. It knew, therefore, that if the company proceeded promptly, as required, it would find within its place limits nearly the full amount of its grant. It must be presumed that Congress acted and would act in good faith, and, of course, there could be no intent to deplete this grant to plaintiff by subsequent legislation in respect to land grants. On the other hand, it must be noticed that the grant to the State of Wisconsin to aid in the construction of the road of the defendant railway company was prior to that to the plaintiff, and also that prior thereto the defendant had filed its map of definite location. In passing the act of July 2, 1864, it is, therefore, reasonable to suppose that Congress had in mind its earlier grant, and did not intend that it should be diminished in any manner thereby, but meant that the defendant railway company should receive either within its place or indemnity limits the full amount of its lands. This, doubtless, was one of the considerations which made the grant to the Northern Pacific of so large an extent.

Syllabus.

It may be well in concluding this opinion to again note the fact, already mentioned, that the withdrawal here considered was one in favor of an earlier grant. It may be that a different rule would obtain in case it was in favor of a later grant. As to place lands, it is settled that, in case of conflict, the title depends on the dates of the grants and not on the times of the filing of the maps of definite location. In other words, the earlier grant has the higher right. No scramble as to the matter of location avails either road, and it may be that the same thought would operate to uphold the title to the place lands of an earlier as against a withdrawal in favor of a later grant. Neither is it intended to question the rule that the title to indemnity lands dates from selection and not from the grant. All that we here hold is, that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant and made prior to the filing of the map of definite location by a company having a later grant — the latter having such words of exception and limitation as are found in the grant to the plaintiff — it operates to except the withdrawn lands from the scope of such later grant.

We see no error in the record, and the decree of the Court of Appeals is

Affirmed.